Volume 8, No. 23, Pages 7876 to 8114,
November 1 - November 12, 1993

# FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

# FEDERAL COMMUNICATIONS COMMISSION

**James H. Quello, Chairman**

**Andrew C. Barrett**

**Ervin S. Duggan**

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

**Citation Form: 8 FCC Rcd 1 (1993)**

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office on a subscription basis

# Federal Communications Commission Record

## Volume 8
## Issue 23

Table of Contents


Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 7876

# Table of Cases
Volume 8
Issue 23


| Case Name | Page |
|---|---|
| Advisory Committee on Advanced Television Service | 7905 |
| Amateur Operator License Examination Reimbursement Fee | 7908 |
| Amendment of Part 97 - Temporary Operating Authority | 7916 |
| Amendment of Parts 32 and 64 - Accounting Requirements | 8071 |
| Amendment to Parts 15 and 90 - Cordless Telephones | 7940 |
| Anderson, Harold | 7974 |
| BESCOM, Inc. | 7968 |
| Bernstein, Edwin A. | 8016 |
| Bodorff, Richard J., Esq. | 7909 |
| Broadband Personal Communications Devices (Unlicensed) | 7906 |
| Buckeye Cablevision, Inc. | 7944 |
| Butte County Cellular License Corp. | 7894 |
| C.F. Communications Corporation (ERRATUM) | 7927 |
| Central Missouri State University | 7877 |
| Central Missouri State University | 7878 |
| Central Missouri State University | 7879 |
| Central Missouri State University | 7880 |
| Central Missouri State University | 7881 |
| Central Missouri State University | 7882 |
| Central Missouri State University | 7883 |
| Central Missouri State University | 7876 |
| Central Missouri State University | 7947 |
| Chiabai, Richard V. | 7958 |
| Clarksville Radio | 8006 |
| Communication Technical Services, Inc. | 7952 |
| Direct Broadcasting Satellite Corporation | 7959 |
| Directsat Corporation | 7962 |
| GTE Service Corporation | 7907 |
| Greater Dayton Public Television | 7954 |
| Guam Educational Radio Foundation | 7966 |
| Harlan,Joe | 7957 |
| Independent Communications, Inc. | 7886 |
| JC Computer Warehouse | 7896 |
| KXRM Partnership | 7890 |
| Koplar Communications | 7884 |
| Larsen, Leland M. | 7892 |
| Matos, Aurio A. | 7920 |
| Media West Broadcast Group, Inc. | 8019 |
| Miami International Gateway, Inc. | 7971 |
| Microwave Assignments Available on Floppy Disk | 8022 |
| NYNEX Waiver of Computer III | 8018 |
| Nucla-Naturita Telephone Company | 7925 |
| Paramount Communications Inc. | 8015 |

| Case Name | Page |
|---|---|
| RKZ Television, Inc. | 8008 |
| Regulatory Treatment of Mobile Services | 7988 |
| Rem Malloy Broadcasting | 7923 |
| Rinn, Timothy N. | 7956 |
| Rivertown Communications Company, Inc. | 7928 |
| Sagittarius Broadcasting Corporation | 7975 |
| Scripps-Howard Broadcasting Co. | 8012 |
| Simplification of the Depreciation Prescription Process | 8052 |
| Southern Broadcasting Companies, Inc. | 7893 |
| TN Technologies, Inc. | 7903 |
| Table of Allotments, FM, Anchorage and Seward, AK | 7981 |
| Table of Allotments, FM, Cal-Nev-Ari, NV | 7985 |
| Table of Allotments, FM, Colonial Heights, TN | 7901 |
| Table of Allotments, FM, Ely, NV | 7910 |
| Table of Allotments, FM, Franklinton, LA | 7912 |
| Table of Allotments, FM, Moberly, MO | 7978 |
| Table of Allotments, FM, Pioche, NV | 7914 |
| Table of Allotments, FM, Provincetown, MA | 7979 |
| Table of Allotments, FM, Rainelle, WV | 7977 |
| Table of Allotments, FM, Staples, MN | 7898 |
| Table of Allotments, FM, Volcano, HI | 7900 |
| Table of Allotments, FM, Webster Springs, WV | 7899 |
| Table of Allotments, FM, Woodville, MS and Clayton, LA | 7983 |
| The Computer Shop | 7973 |
| The University Foundation California State University at Chico | 7888 |
| Trident Seafoods Corporation | 7972 |
| US Sprint Communications Company, Limited Partnership | 7941 |
| WSBT, Inc. | 7948 |
| Western New York Communications | 7955 |

# Table of Cases by Delegated Authority and FCC Number

Volume 8
Issue 23


| Delegated Authority or FCC Number | Page |
|---|---|
| DA 93 -1222 | 7901 |
| DA 93 -1238 | 7877 |
| DA 93 -1239 | 7878 |
| DA 93 -1240 | 7879 |
| DA 93 -1241 | 7880 |
| DA 93 -1242 | 7881 |
| DA 93 -1243 | 7876 |
| DA 93 -1244 | 7882 |
| DA 93 -1245 | 7883 |
| DA 93 -1251 | 7908 |
| DA 93 -1253 | 7888 |
| DA 93 -1261 | 8008 |
| DA 93 -1262 | 7900 |
| DA 93 -1265 | 7985 |
| DA 93 -1266 | 7910 |
| DA 93 -1267 | 7914 |
| DA 93 -1268 | 7898 |
| DA 93 -1269 | 7912 |
| DA 93 -1270 | 7977 |
| DA 93 -1271 | 7978 |
| DA 93 -1272 | 7899 |
| DA 93 -1278 | 7906 |
| DA 93 -1280 | 7905 |
| DA 93 -1283 | 7893 |
| DA 93 -1284 | 7892 |
| DA 93 -1285 | 7894 |
| DA 93 -1286 | 7896 |
| DA 93 -1287 | 8022 |
| DA 93 -1288 | 7903 |
| DA 93 -1289 | 7907 |
| DA 93 -1290 | 7948 |
| DA 93 -1291 | 7944 |
| DA 93 -1292 | 7954 |
| DA 93 -1293 | 7947 |
| DA 93 -1295 | 7909 |
| DA 93 -1296 | 7925 |
| DA 93 -1297 | 7972 |
| DA 93 -1298 | 7952 |
| DA 93 -1299 | 7927 |
| DA 93 -1300 | 7979 |
| DA 93 -1301 | 7981 |
| DA 93 -1307 | 7983 |
| DA 93 -1311 | 8015 |
| DA 93 -1312 | 7941 |
| DA 93 -1318 | 7940 |
| DA 93 -1322 | 7955 |
| DA 93 -1323 | 7973 |
| DA 93 -1324 | 7956 |
| DA 93 -1325 | 7957 |
| DA 93 -1326 | 7958 |
| DA 93 -1327 | 7966 |
| DA 93 -1328 | 7968 |
| DA 93 -1329 | 7971 |
| DA 93 -1331 | 7962 |
| DA 93 -1332 | 7959 |
| DA 93 -1333 | 7974 |
| DA 93 -1335 | 8018 |
| FCC 93 - 452 | 8052 |
| FCC 93 - 453 | 8071 |
| FCC 93 - 454 | 7988 |
| FCC 93 - 468 | 8012 |
| FCC 93 - 480 | 7916 |
| FCC 93 - 481 | 7884 |
| FCC 93 - 482 | 7886 |
| FCC 93 - 483 | 7890 |
| FCC 93 - 486 | 7975 |
| FCC 93D - 20 | 7920 |
| FCC 93D - 21 | 7928 |
| FCC 93R - 55 | 7923 |
| FCC 93R - 56 | 8006 |
| FCC 93R - 57 | 8019 |
| FCC 93R - 58 | 8016 |

# Table of Cases by Docket Number
Volume 8
Issue 23


| Docket Number | | | | Page |
|---|---|---|---|---|
| CC | Dkt.No.92 | - | 296 | 8052 |
| CC | Dkt.No.93 | - | 251 | 8071 |
| ET | Dkt.No.92 | - | 9 | 8022 |
| ET | Dkt.No.93 | - | 235 | 7940 |
| GEN | Dkt.No.90 | - | 314 | 7906 |
| GN | Dkt.No.93 | - | 252 | 7988 |
| MM | Dkt.No.88 | - | 306 | 7923 |
| MM | Dkt.No.88 | - | 584 | 8016 |
| MM | Dkt.No.89 | - | 543 | 8019 |
| MM | Dkt.No.91 | - | 98 | 8006 |
| MM | Dkt.No.92 | - | 316 | 7928 |
| MM | Dkt.No.93 | - | 28 | 7901 |
| MM | Dkt.No.93 | - | 89 | 7920 |
| MM | Dkt.No.93 | - | 139 | 7981 |
| MM | Dkt.No.93 | - | 147 | 7900 |
| MM | Dkt.No.93 | - | 204 | 7979 |
| MM | Dkt.No.93 | - | 209 | 7977 |
| MM | Dkt.No.93 | - | 210 | 7899 |
| MM | Dkt.No.93 | - | 219 | 7898 |
| MM | Dkt.No.93 | - | 222 | 7978 |
| MM | Dkt.No.93 | - | 273 | 7888 |
| MM | Dkt.No.93 | - | 274 | 7910 |
| MM | Dkt.No.93 | - | 275 | 7914 |
| MM | Dkt.No.93 | - | 276 | 7912 |
| MM | Dkt.No.93 | - | 279 | 7985 |
| MM | Dkt.No.93 | - | 284 | 7983 |
| PR | Dkt.No.93 | - | 267 | 7916 |

# Table of Cases by Rulemaking Number

Volume 8
Issue 23


| Rulemaking Number | Page |
|---|---|
| RM - 8094 | 7940 |
| RM - 8172 | 7901 |
| RM - 8211 | 7981 |
| RM - 8232 | 7900 |
| RM - 8266 | 7979 |
| RM - 8282 | 7977 |
| RM - 8283 | 7899 |
| RM - 8288 | 7916 |
| RM - 8290 | 7898 |
| RM - 8297 | 7978 |
| RM - 8299 | 7901 |
| RM - 8307 | 7981 |
| RM - 8353 | 7912 |
| RM - 8368 | 7985 |
| RM - 8372 | 7910 |
| RM - 8373 | 7914 |
| RM - 8375 | 7983 |

Table of Cases by City
Volume 8
Issue 23


| City/ State | Page |
|---|---|
| Anacortes, WA | 7958 |
| Anchorage, AK | 7981 |
| Anchorage, AK | 7974 |
| Anniston, AL | 8008 |
| Bellingham, WA | 7956 |
| Buffalo, NY | 7955 |
| Cal-Nev-Ari, NV | 7985 |
| Center Moriches, NY | 8016 |
| Chico, CA | 7894 |
| Clarksville, IN | 8006 |
| Clayton, LA | 7983 |
| Colonial Heights, TN | 7901 |
| Colorado Springs, CO | 7890 |
| Denver, CO | 7892 |
| Eldon, IA | 7928 |
| Ely, NV | 7910 |
| Franklinton, LA | 7912 |
| Industry, CA | 7896 |
| Kodiak, AK | 7957 |
| Lost Peninsula, MI | 7944 |
| Memphis, TN | 8012 |
| Moberly, MO | 7978 |
| New York, NY | 7975 |
| Oxford, OH | 7954 |
| Pioche, NV | 7914 |
| Provincetown, MA | 7979 |
| Rainelle, WV | 7977 |
| Raleigh, NC | 7923 |
| Redding, CA | 7888 |
| Round Rock, TX | 7903 |
| Sacramento, CA | 8019 |
| Seattle, WA | 7972 |
| Sedalia, MO | 7877 |
| Sedalia, MO | 7878 |
| Sedalia, MO | 7879 |
| Sedalia, MO | 7880 |
| Sedalia, MO | 7881 |
| Sedalia, MO | 7882 |
| Sedalia, MO | 7883 |
| Sedalia, MO | 7876 |
| Sedalia, MO | 7947 |
| Seward, AK | 7981 |
| Sioux Falls, SD | 7886 |
| South Bend, IN | 7948 |
| St. Louis, MO | 7884 |
| Staples, MN | 7898 |
| Thomasville, GA | 7893 |
| Toledo, OH | 7944 |
| Volcano, HI | 7900 |
| Washington, DC | 7909 |
| Webster Springs, WV | 7899 |
| Woodville, MS | 7983 |

Subject Index
Volume 8
Issue 23


| Subject | Page |
|---|---|
| Access Charges | |
| End users, computation of charges on | |
| Single/multi/party line end users, charges on common line | 7927 |
| General information | |
| End users, persons to be assessed are | 7927 |
| Subpart: rules for interstate/foreign access services | 7927 |
| Adjudication | |
| Administrative Law Judge Decision | |
| Financial qualifications | 7923 |
| Integration of ownership (qualitative), local residence 8016, | 8019 |
| Integration of ownership into management, qualitative aspect | 8019 |
| Orders or Notices | |
| Lottery to select licensee | 7888 |
| Pleadings, parties requested to file | 7928 |
| Programming, specialized | 7928 |
| Review Board or Commission Decision | |
| Comparative coverage | 7920 |
| Integration of ownership (qualitative), minority participation | 7920 |
| Integration of ownership into management, qualitative 7920, | 7920 |
| Reopening of record | 7928 |
| Amateur Radio Service (ARS) | |
| ARS - Transmissions and practices, prohibited | |
| Obscenity/indecency/profanity prohibited | 7916 |
| Broadcast Radio Services - General Rules | |
| Applications for authorization | |
| Public inspection file of commercial stations, local | 7893 |
| Licenses and permits | |
| Multiple ownership of broadcast stations in the same service | 8012 |
| Operating hours | |
| Schedule | 7893 |
| Program contents | |
| Sponsorship identification | 7892 |
| Broadcasting - FM Stations | |
| Allotments and assignments | |
| Allotments, table of 7898, 7899, 7900, 7910 7914, 7912, 7978, 7977 7983, 7979, 7981, 7985 | |

| Subject | Page |
|---|---|
| Broadcasting - Noncommercial Educational FM | |
| Applications and licenses | |
| Licensing requirements | 7909 |
| Cable Television Service | |
| Markets and services | |
| Cable signals in major markets, provisions 7877, 7878, 7880, 7881, 7882, 7883, 7876, 7947 | |
| Cable signals in smaller markets,provisions for 8008, 7948, 7944 | |
| Technical regulations | |
| Aeronautical and marine frequencies, operation near | 7954 |
| Carriers: Service Altered | |
| Extensions and supplements | |
| Applications, contents of 7966, 7968, 7971, | 7952 |
| Commission Organization | |
| Delegations of authority - Chief, Common Carrier Bureau | |
| Limitations on delegated authority | 7925 |
| Common Carriers/Affiliates: Reports | |
| Depreciation rates, reports of proposed changes in | 8052 |
| Common Carriers: Miscellaneous Rules | |
| Enhanced services (computer) and customer-premises equipment | 8018 |
| Communications Act of 1934 | |
| Common Carriers | |
| Accounts, records, memoranda,forms of; depreciation charges | 8052 |
| Charges, schedules of | 7941 |
| Discrimination and preferences | 7941 |
| Extension of lines, certificate for 7966, 7968, 7971, | 7952 |
| Penal provisions; forfeitures | |
| Rebates and offsets, forfeitures in cases of 7884, 7886, 7893, 7890, 7903, | 7892, 7975 |
| Radio, provisions relating to | |
| License for radio communication or transmission of energy | 7957 |
| Direct Broadcast Satellite Service (DBS) | |
| Licenses | |
| Authorization conditions 7962, | 7959 |
| Frequency Allocations and Radio Treaty Matters | |
| Marketing of radiofrequency devices | |
| Devices not approved, limitations on 7896, 7903, 7973, | 7955 |

| Subject | Page |
|---|---|
| Maritime Services | |
| Operating procedures - general | |
| Radiotelephone station identification | 7956, 7958 |
| Practice and Procedure | |
| Common carriers: complaints | |
| Formal or informal | 7941 |
| Ex parte presentations, general information | |
| Purpose: to specify standards of conduct and procedure | 8015 |
| Proceedings, miscellaneous | |
| Forfeiture proceedings | 7896, 7903, 7972, 7974, 7957, 7958 |
| Reconsideration/review of Commission action | |
| Reconsideration of a final FCC action, | 7973, 7975, 7955, 7957 |
| Public Mobile Service | |
| Applications and licenses-filing requirements | |
| Amendment of applications | 7894 |
| Applications and licenses-processing | |
| Mutually exclusive applications | 7894 |
| Radio Frequency Devices | |
| Lowpower communication devices: general requirements | |
| Provisions in this subpart for operation of a (lpcd) | 7955 |
| Statutory Citations Other than Communications | |
| Obscenity | |
| Obscene language, broadcasting | 7975 |
| Telecommunications Companies: Classes A and B | |
| Nonregulated activities | 8071 |

# TABLE OF STATUTORY AND RULE PROVISIONS


| | Page |
|---|---|
| 000.291 Delegated Authority | 7907 |
| 000.291 Delegated Authority | 7925 |
| 001.106 Petitions for Reconsideration | 7955 |
| 001.106 Petitions for Reconsideration | 7957 |
| 001.106 Petitions for Reconsideration | 7973 |
| 001.106(f) Petitions for Reconsideration | 7975 |
| 001.1200 - EX PARTE COMMUNICATIONS, INTRODUCTION | 8015 |
| 001.1204 - EX PARTE COMMUNICATIONS, GEN'L EXEMPTIONS | 8015 |
| 001.711 Formal or informal complaints | 7941 |
| 001.800 Forfeiture Proceedings | 7896 |
| 001.800 Forfeiture Proceedings | 7903 |
| 001.800 Forfeiture Proceedings | 7957 |
| 001.800 Forfeiture Proceedings | 7958 |
| 001.800 Forfeiture Proceedings | 7972 |
| 001.800 Forfeiture Proceedings | 7974 |
| 002.803 Equipment Requiring Authorization | 7955 |
| 002.803 Equipment Requiring Authorization | 7973 |
| 002.803 Equipment Requiring Commission Approval | 7896 |
| 002.803 Equipment Requiring Commission Approval | 7903 |
| 003(n) Definitions | 7988 |
| 015.101 Equipment Authorization of Unintentional Radiators | 7955 |
| 022.230 Amendment of applications | 7894 |
| 022.310 Mutually exclusive applications | 7894 |
| 063.001 Contents of Application | 7952 |
| 063.001 Contents of Application | 7966 |
| 063.001 Contents of Application | 7968 |
| 063.001 Contents of Application | 7971 |
| 064.702, Furnishing of Enhanced Services & CPE | 8018 |
| 069.001 Application of access charges. | 7927 |
| 069.005 Persons to be assessed. | 7927 |
| 069.104 End user common line. | 7927 |
| 069.105 Carrier common line. | 7927 |
| 073.1212 Sponsorship identification | 7892 |
| 073.1740(a)(4) Discontinuance of operation | 7893 |
| 073.202 FM Table of Allotments | 7898 |
| 073.202 FM Table of Allotments | 7899 |
| 073.202 FM Table of Allotments | 7900 |
| 073.202 FM Table of Allotments | 7912 |
| 073.202 FM Table of Allotments | 7914 |
| 073.202 FM Table of Allotments | 7977 |
| 073.202 FM Table of Allotments | 7978 |
| 073.202 FM Table of Allotments | 7979 |
| 073.202 FM Table of Allotments | 7981 |
| 073.202 FM Table of Allotments | 7983 |
| 073.3526 Public inspection file of commercial stations | 7893 |
| 073.503(d) Service requirements, noncommercial FM broadcast | 7909 |
| 073.670 COMMERCIAL LIMITS IN CHILDREN'S PROGRAMS | 7884 |
| 073.670 COMMERCIAL LIMITS IN CHILDREN'S PROGRAMS | 7886 |
| 073.670 COMMERCIAL LIMITS IN CHILDREN'S PROGRAMS | 7890 |
| 076.590 Modification of television markets | 7944 |

076.590 Modification of television markets ..... 7948
076.590 Modification of television Markets ..... 8008
076.61(b) Complaints regarding qualified NCE stations ..... 7878
076.61(b) Complaints regarding qualified NCE stations ..... 7879
076.61(b) Complaints regarding qualified NCE stations ..... 7880
076.610(b) Complaints regarding qualified NCE stati ..... 7883
076.610(b) Complaints regarding qualified NCE stations ..... 7876
076.610(b) Complaints regarding qualified NCE stations ..... 7881
076.610(b) Complaints regarding qualified NCE stations ..... 7882
076.610(b) Complaints regarding qualified NCE stations ..... 7947
076.610(b) Complaints regarding qualified NCE stations ..... 7954
080.102 Radiotelephone Station Identification ..... 7956
080.102 Radiotelephone Station Identification ..... 7958
097.119 Station identification ..... 7916
097.527 Reimbursement for expenses ..... 7908
097.900 Operator license ..... 7916
100.190 License conditions; due diligence ..... 7959
100.190 License conditions; due diligence ..... 7962
300.202(a) Discrimination and Preferences ..... 7941
300.203(c) Schedules of Charges ..... 7941
300.214 Extension of Lines ..... 7952
300.214 Extension of Lines ..... 7966
300.214 Extension of Lines ..... 7968
300.214 Extension of Lines ..... 7971
300.301 License for Radio Communications ..... 7957
300.302 Devices which Interfere with Radio Reception ..... 7896
300.302 Devices which Interfere with Radio Reception ..... 7955
300.302 Devices which Interfere with Radio Reception ..... 7973
300.317 Sponsorship identification ..... 7892
300.503 Forfeitures in Cases of Rebates and Offsets ..... 7903
300.503(b) Forfeitures (Forfeiture Order) ..... 7975
300.503(b) Forfeitures (Memorandum Opinion and Order) ..... 7893
300.503(b) FORFEITURES (NAL) ..... 7884
300.503(b) FORFEITURES (NAL) ..... 7886
300.503(b) FORFEITURES (NAL) ..... 7890
300.503(b) Forfeitures (Notice of Apparent Liability) ..... 7892
300.534 Carriage of local commercial television signal ..... 7944
300.534 Carriage of local commercial television signal ..... 7948
300.534 Carriage of local commercial television signal ..... 8008
300.615 Carriage of noncommercial educational television ..... 7876
300.615 Carriage of noncommercial educational television ..... 7877
300.615 Carriage of noncommercial educational television ..... 7878
300.615 Carriage of noncommercial educational television ..... 7879
300.615 Carriage of noncommercial educational television ..... 7880
300.615 Carriage of noncommercial educational television ..... 7881
300.615 Carriage of noncommercial educational television ..... 7882
300.615 Carriage of noncommercial educational television ..... 7947
300.615 Carriage of noncommercial educational television ..... 7954
300.615 Carriage of noncommercial television ..... 7883
332.000 Private Land Mobile Services ..... 7988
400.181464 Broadcasting Obscene or Indecent Language ..... 7975
500.100 HDO ..... 7888
500.128 Misrepresentation ..... 7928
500.2005 - Integration of Ownership Into Management, Qualita ..... 7920

500.2030 - Integration Qualitative ..... 7920
500.2035 - Integration Quantitative ..... 7920
500.2065 - Comparative Coverage ..... 7920
500.3005 Integration of Ownership into Management, Qualitati ..... 8019
500.3025 Integration of Ownership (Qualitative), Local Resid ..... 8016
500.3035 Integration of Ownership into Management, Quantitat ..... 8019
500.3070 Broadcast Record, Daytimer Preference ..... 8019
500.3125 Misrepresentation and Lack of Candor ..... 8006
500.3170 Financial Qualifications ..... 7923
76.61(b) Complaints regarding qualified NCE Stations ..... 7877
NPRM, FM B/C STAS. (Cal-Nev-Ari, NV), DA 93-1265 ..... 7985

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3910-M MO0836

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Calhoun, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at north latitude 93°37'34" and west longitude 38°38'02", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Calhoun cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3917-M MO0821

Request for Carriage

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Urich, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Urich, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Urich cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

| | |
|---|---|
| Complaint of | CSR-3919-M |
| Central Missouri | MO0822 |
| State University against | |
| Douglas Cable Communications | |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Mayview, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Mayview, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Mayview cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

Roy J. Stewart
Chief, Mass Media Bureau

In re:

| | |
|---|---|
| Complaint of | CSR-3916-M |
| Central Missouri | MO0168 |
| State University against | |
| Douglas Cable Communications | |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Gilliam, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at north latitude 93$^{0}$00'16" and west longitude 39$^{0}$14'00", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Gilliam cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

| | |
|---|---|
| Complaint of | CSR-3914-M |
| Central Missouri | MO0206 |
| State University against | |
| Douglas Cable Communications | |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving LaMonte, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at north latitude 93°25'30" and west longitude 38°46'27", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the LaMonte cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Central Missouri State University against Douglas Cable Communications

CSR-3912-M
MO0118

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Slater, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at north latitude 93°04'08" and west longitude 39°13'05", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Slater cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

In re:

| | |
|---|---|
| Complaint of | CSR-3918-M |
| Central Missouri | MO0920 |
| State University against | |
| Douglas Cable Communications | |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Creighton, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Creighton, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Creighton cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Complaint of Central Missouri State University against Douglas Cable Communications

CSR-3913-M
MO0105

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 12, 1993; Released: November 1, 1993**

By the Chief, Mass Media Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Higginsville, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at north latitude 93°43'01" and west longitude 39°04'21", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Higginsville cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

**Released: November 1, 1993**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Koplar Communications 1800E
Licensee, KPLR-TV
4935 Lindell Blvd.
St. Louis, Missouri 63108

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of thirty thousand dollars ($30,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On October 2, 1992, you filed an application for renewal of license (FCC Form 303-S) for KPLR-TV, St. Louis, Missouri (BRCT-921002KF). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. Section 73.670. In this supplement, you indicated that KPLR-TV had failed to comply with the limitations on commercial matter during children's programming during your last license term. You also attached, as Exhibit B, an explanation of your noncompliance.

In Exhibit B, you stated that from January 1, 1992, through April 30, 1992, KPLR-TV routinely exceeded the commercial limits during children's programming during the 7:00 to 8:00 am and 8:00 to 9:00 am hours on weekdays. You claim that these overages occurred because you had not counted the commercials between each half-hour block in calculating the commercial matter in that hour. However, the Commission counts commercial minutes based on clock hours. *Children's Television Programming*, 6 FCC Rcd at 2112. You also stated that there were two other instances of commercial overages, one on January 3, 1992, and one on February 13, 1992, which resulted from traffic errors.

You claim that the commercial overages were discovered when the April 1992 quarterly report was prepared. You further claim that the following steps were taken in order to avoid future commercial overages: (1) the matter was discussed with communications counsel; (2) meetings were held with sales and traffic staff to discuss the problem; and (3) the traffic computer system was reprogrammed to prevent recurrence. Since May 1992, you indicate that there have been only four instances of commercial overages during children's programming.

In an amendment to KPLR-TV's license renewal application filed February 4, 1993, you indicate that from January 1, 1992, through April 30, 1992, the commercial limits during children's programming were routinely exceeded not only during the 7:00 to 8:00 am and 8:00 to 9:00 am hours, but also during the 2:00 to 2:30 pm, 3:00 to 4:00 pm and 4:00 to 5:00 pm time periods on weekdays and the 9:00 to 10:00 am hour on weekends. This amendment revealed a total of 197 instances of commercial overages during children's programming during your license term. Of this total, 193 of the instances occurred between January 1 and April 30, 1992. Moreover, the amount of the overages were as follows: one 3.5-minute overage; six 2.5-minute overages; one 2.3-minute overage; one 2-minute overage; 13 1.8-minute overages; two 1.5-minute overages; 99 1-minute overages; and 74 overages of less than one minute.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 197 occasions during your license period after these limits became effective, constitutes a willful and repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, Koplar Communications is hereby advised of its apparent liability for forfeiture of thirty thousand dollars ($30,000) for its apparent willful and repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1992).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 197 instances in which you repeatedly exceeded the Commission's limits on commercial matter during children's programming is an unusually high number of violations. Moreover, 193 of these violations occurred in a four-month period, from January 1 through April 30, 1992. In addition, 123 of the commercial overages were one minute in length or longer. Overages of this length suggest that on 123 occasions at least two additional 30-second commercials were run during an hour of children's programming. This high number of repeated instances of commercial overages and the length of these overages clearly indicate that, initially, you did not establish an effective program to monitor compliance with the Commission's commercial limits. Overages of this magnitude mean that children have been subjected to commercial overages greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990. In this situation, the large number of commercial overages constitutes a repeated violation. Moreover, the length of such overages, and the lack of an effective program to ensure compliance constitutes egregious misconduct. These factors warrant an upward adjustment of the forfeiture amount.

When the Commission delayed the effective date of 47 C.F.R. Section 73.670 until January 1, 1992, we stated that, "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. Thus, the fact that the majority of your commercial overages occurred at the beginning of the period during which the commercial limits went into effect does not mitigate the extremely high number of commercial overages. Furthermore, you offer no explanation of your decision not to count commercial matter between half-hour blocks of children's programming, nor have you proffered any extraordinary transitional or other difficulties that prevented Station KPLR-TV from fully complying with the children's advertising limitations during this four-month period. Finally, the fact that you apparently implemented a plan by April 1992 which reduced, but did not eliminate, future commercial overages, does not relieve you of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969).

With regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on October 21, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Enclosures
cc: Herbert D. Miller, Esquire

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

**Released: November 1, 1993**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Independent Communications, Inc. 1800E
Licensee, KTTM(TV) and KTTW(TV)
P.O. Box 3103
Sioux Falls, South Dakota 57117

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of twenty seven thousand five hundred dollars ($27,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On December 2, 1992, you filed applications for renewal of license (FCC Form 303-S) for KTTM(TV), Huron, South Dakota (BRCT-921202KH), and KTTW(TV), Sioux Falls, South Dakota (BRCT-921202KJ). You also filed supplements to FCC Form 303-S which contain questions to determine whether the licensee has complied with the limits on commercial matter during children's programming as set forth in 47 C.F.R. Section 73.670. In these supplements, you indicated that KTTM(TV) and KTTW(TV) had failed to comply with the statutory requirements to limit commercials during children's programming on numerous occasions during the last license period for both stations. You also attached to each application, as Exhibit C, a list of occasions on which such excess commercialization occurred. On June 29, 1993, pursuant to an informal staff request, you amended both applications to provide additional information concerning the commercial overages which occurred on KTTM(TV) and KTTW(TV). Because KTTM(TV) is operated as a satellite station of KTTW(TV), its programming and commercials are identical.

In your amendments to your license renewal applications, you indicate that between February 3, 1992, and September 26, 1992, there were 121 instances where you exceeded the limits for commercial matter during children's programming. There were three 2-minute overages, four 1.5-minute overages, 44 1-minute overages, and 70 30-second overages. These commercial overages occurred on weekdays between 4:00 and 6:00 pm and on Saturdays between 8:00 and 11:00 am.

You stated that through July 1992, the stations' traffic director believed that the stations were in compliance with the commercial limits during children's programming and reported such belief to the stations' general manager at monthly meetings. You indicated that an outside auditor was used to verify the stations' compliance in June 1992. You claim that although the audit was not completed until August 1992, evidence of the commercial overages was given to the stations' general manager at the end of July 1992. You claim that an entirely new traffic software/hardware system was installed by the end of September 1992. After July 31, 1992, when the commercial overages came to your attention, there were only 12 more instances of exceeding the commercial limits. These commercial overages, you claim, were caused by two new inexperienced employees, the traffic director going on wedding leave, problems understanding break format changes, and a sales manager who was too zealous. Finally, you state that with the new traffic system in operation, there have been no more overages since September 28, 1992.

Your record of exceeding the commercial limits during children's programming throughout most of your license period after these limits became effective, constitutes a willful and repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, Independent Communications, Inc., is hereby advised of its apparent liability for forfeiture of twenty seven thousand five hundred dollars ($27,500) for its apparent willful and repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 121 instances in which you exceeded the hourly limits on commercial matter during children's programming is an unusually high number of violations. Moreover, 51 of the commercial overages were one minute in length or longer. Overages of this length suggest that on 49 occasions at least two additional 30-second commercials were run during an hour of children's programming. The commercial overages began in February 1992, and occurred repeatedly through September 1992, almost the entire time of your license period that the commercial limits were in effect. Overages of this magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990.

When the Commission delayed the effective date of 47 C.F.R. Section 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming,* 6 FCC Rcd 5530 n.10. It appears that you did not avail yourself of such an opportunity. Although you claim that the traffic director reported that the station was in compliance with the commercial limits in monthly meetings with the general manager, it is obvious that such statements were not based on fact. Since the overages continued for eight months, it is apparent that there was no effective procedure for ensuring station compliance with the commercial limits on any ongoing basis. Moreover, it appears that once you became aware of the problem, overages continued during the two-month period preceeding installation of the station's new traffic software/hardware system. In this situation, the large number of commercial overages constitutes a repeated violation. Moreover, the length of such overages, the period of time over which such overages occurred, and the lack of an effective monitoring program constitute egregious misconduct. These factors warrant an upward adjustment of the forfeiture amount.

Notwithstanding this action, we find you qualified to remain a Commission licensee and conclude that grant of your applications for renewal of license for Stations KTTM(TV) and KTTW(TV) would serve the public interest. Therefore, your applications, BRCT-921202KH and BRCT-921202KJ, ARE HEREBY GRANTED.

With regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on October 21, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Enclosures
cc: Dennis F. Begley, Esquire

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-273**

In re Applications of:

THE UNIVERSITY FOUNDATION CALIFORNIA STATE UNIVERSITY AT CHICO (hereafter "Foundation") Redding, California — File No. BPED-920316ME

For Construction Permit for a New Noncommercial FM Station on Channel 215 in Redding, California

STATE OF OREGON ACTING BY AND THROUGH THE STATE BOARD OF HIGHER EDUCATION AND FOR SOUTHERN OREGON STATE COLLEGE (hereafter "Oregon") — File No. BPED-920630ME

For Modification of Noncommercial Station KSKF(FM), Klamath Falls, Oregon

**HEARING DESIGNATION ORDER**

**Adopted: October 15, 1993; Released: November 2, 1993**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications, one for a new noncommercial FM station and one for modification of an existing noncommercial FM station.

2. *Foundation.* Foundation indicated in Section III, Item 1 of FCC Form 340 (May 1989) that its application is contingent upon receipt of a grant from the National Telecommunications and Information Administration (NTIA). Commission records indicate that Foundation has received funds to construct a station in Redding, California, on either Channel 215C2 or Channel 205C1. On September 29, 1992, the Commission granted a construction permit to Foundation for Channel 205C1 (BPED-880610ML) pursuant to Foundation's decision to apply the NTIA funds to that proposal. Accordingly, a financial qualifications issue will be specified.

3. *Share-time agreement.* It does not appear that the applicants have discussed a possible share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at anytime during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

4. *Section 307(b).* The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

5. *Other matters.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

6. Foundation filed an amendment to its application after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed.[1] Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

[1] Foundation indicated in its application that there were unresolved character issues in the prior proceeding involving the Redding, California application for Channel 205C1 (BPED-880610ML). The issues were resolved and Foundation's construction permit was granted by letter on September 29, 1992. Oregon filed a petition for reconsideration of that grant on November 6, 1992. Oregon also filed an application for a new noncommercial FM station to serve Redding, California (BPED-900129MH). Oregon's application was mutually exclusive with Foundation's application. In a letter dated June 21, 1990, the Chief of the FM Branch returned Oregon's application as unacceptable for filing. On August 13, 1990, Oregon filed an application for review of that action. The application for review was denied on May 18, 1993, and on June 17, 1993, Oregon filed a petition for reconsideration of that action.

1. To determine whether Foundation is financially qualified.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. Section 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

9. IT IS FURTHER ORDERED, That the amendment filed by Foundation IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**

**Released: November 2, 1993**

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

KXRM Partnership 1800E
Licensee, KXRM-TV
560 Wooten Road
Colorado Springs, CO 80915

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of twenty five thousand dollars ($25,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On December 1, 1992, you filed an application for renewal of license (FCC Form 303-S) for KXRM-TV, Colorado Springs, Colorado (BRCT-921201KZ). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter during children's programming as set forth in 47 C.F.R. Section 73.670. In this supplement, you indicated that KXRM-TV had failed to comply with the statutory requirements to limit commercials during children's programming on numerous occasions during your last license period. You also attached, as Exhibit C, a list of occasions on which such excess commercialization occurred.

In Exhibit C to your license renewal application, you indicate that between January 25, 1992, and September 11, 1992, there were 87 instances where you exceeded the limits for commercial matter during children's programming. There was one 2-minute overage, 32 1.5-minute overages, 16 1-minute overages, and 38 overages of less than one minute. These commercial overages occurred on all days of the week, during various time periods, and in every month between January and September 1992, except for May.

You state that when the commercial limits for children's programming went into effect in January 1992, you implemented a plan to limit the commercial time available during children's programming. Under this plan, you were supposed to fill time that had previously been allocated as available for commercials with additional public service material. You indicate that this plan did not work in practice because there was confusion and overlapping effort between your traffic and programming departments. Consequently, you overscheduled commercial matter during children's programming throughout much of 1992. You also state that you have now implemented a program to ensure compliance with these commercial limits. This program includes altering computer program files to make only the statutory amount of commercial time available and an ongoing monitoring of the commercial content in children's programming by your program department.

Your record of exceeding the commercial limits during children's programming throughout most of your license period after these limits became effective, constitutes a willful and repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, KXRM Partnership is hereby advised of its apparent liability for forfeiture of twenty five thousand dollars ($25,000) for its apparent willful and repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. Finally, we have considered whether or not the licensee established an effective program to monitor compliance.

The 87 instances in which you exceeded the hourly limits on commercial matter during children's programming is an unusually high number of violations. Moreover, 49 of the commercial overages were one minute in length or longer. Overages of this length suggest that on 49 occasions at least two additional 30-second commercials were run during an hour of children's programming. The commercial overages began in January 1992, and occurred repeatedly through September 1992, almost the entire time of your license period that the commercial limits were in

effect. Overages of this magnitude mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990.

When the Commission delayed the effective date of 47 C.F.R. Section 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming,* 6 FCC Rcd 5530 n.10. It appears that you did not avail yourself of such an opportunity. Although you claim that you implemented a plan to ensure compliance with the commercial limits during children's programming, it is obvious that the plan was ineffective. Since the overages continued for eight months, it is apparent that there was no effective procedure for monitoring station compliance with the commercial limits. Moreover, it appears that corrective action was not implemented until shortly before your license renewal application was filed. In this situation, the large number of commercial overages constitutes a repeated violation. Moreover, the length of the overages, the period of time during which such overages occurred, and the lack of an effective monitoring program constitute egregious misconduct. These factors warrant an upward adjustment of the forfeiture amount.

With regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on October 21, 1993.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**October 25, 1993**

**Released: November 2, 1993**

**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Leland M. Larsen, 1800C1-MGK
Vice-President/General Manager 92120069
Jacor Broadcasting of Colorado, Inc.
Licensee, Station KOA-AM
1380 Lawrence Street
Suite 1300
Denver, Colorado 80204

Dear Mr. Larsen:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE, pursuant to Section 503(b) of the Communications Act of 1934, as amended.

By letter of July 14, 1993, we inquired into a possible violation of Section 317 of the Communications Act of 1934, as amended, and Section 73.1212 of the Commission's Rules. These provisions require, in pertinent part, that any material broadcast in exchange for money, service, or other valuable consideration paid to a broadcast station, directly or indirectly, be accompanied by a sponsorship identification announcement or disclosure. This announcement must clearly advise the audience that the time was purchased and by whom. Our letter cited a complaint that Station KOA had broadcast a promotional announcement concerning Cripple Creek, Colorado, with no sponsorship identification.

Your reply of August 26, 1993, concedes broadcast of five 60-second announcements for Cripple Creek, aired in rotating order during the month of November 1992, for a total of 51 spots. These announcements were sponsored by the Cripple Creek Chamber of Commerce, which paid money directly to Station KOA, but is not identified as the sponsor in any of the announcements. However, you maintain that each announcement was clearly an advertisement for commercial services and attractions available from businesses in the community of Cripple Creek. Citing Section 73.1212(f) of the Commission's Rules, you assert that mention of the attractions of Cripple Creek constitutes a "mention of the name of the product [that] constitutes a sponsorship identification" within the context of that provision.

Section 73.1212(f) in pertinent part provides that "[i]n the case of broadcast matter advertising commercial products or services, an announcement stating ... the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section...." You attempt to bring your announcements within the terms of this provision by arguing that the businesses of Cripple Creek are a "product" and the Cripple Creek Chamber of Commerce a "sponsor." The obvious commercial nature of the announcements, which included the Chamber of Commerce's "800" telephone number, make the identity of the sponsor clear, you assert.

We disagree. Even assuming, as you claim, that the announcements promote generally the commercial services and attractions available from Cripple Creek businesses, there is no logical connection between these businesses and the Cripple Creek Chamber of Commerce. A listener hearing of Cripple Creek's restaurants, lodgings, tours, train rides and other offerings does not think automatically of the Cripple Creek Chamber of Commerce. The two entities--businesses and Chamber of Commerce--are not obviously intertwined in the public mind. They are not "product" and "sponsor" as those terms are commonly understood.

You argue additionally that the spots were played over the telephone for a Federal Communications Commission employee who informally approved them prior to their broadcast. While acknowledging that such approval does not bind the Commission, you maintain that your efforts demonstrate a reasonable and good faith attempt to assess your obligations. We note, however, that the informal opinion appears to concern the announcements' compliance with our lottery provision rather than their compliance with Section 73.1212, the sponsorship identification rule. As the licensee of Station KOA you were ultimately responsible for the announcements broadcast on the station, a responsibility which you could not shift to Commission employees.

Accordingly, pursuant to Section 503(b) of the Communications Act, Jacor Broadcasting of Colorado, Inc., is hereby advised of its apparent liability for a forfeiture of ten thousand dollars ($10,000) for its apparent violation of Section 73.1212 of the Commission's Rules. The amount specified was determined by using the criteria set forth in the *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 U.S.C. Section 1.80(f)(3). Other relevant provisions of Section 1.80 are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Liability of
Southern Broadcasting Companies, Inc.
Former Licensee, Station WSTT-AM
Thomasville, Georgia

For a Forfeiture

## MEMORANDUM OPINION AND ORDER

**Adopted: October 25, 1993; Released: November 2, 1993**

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 8 FCC Rcd 5051 (1993), imposing a forfeiture of $17,500 upon Southern Broadcasting Companies, Inc., former licensee of Station WSTT-AM, Thomasville, Georgia,[1] for violation of Sections 73.1740(a)(4) and 73.3526 of the Commission's Rules, and (2) Southern Broadcasting Companies' response to the NAL filed September 20, 1993.

2. Section 73.1740(a)(4) in pertinent part requires that licensees unable to continue operating for reasons beyond their control notify the Commission of this fact and seek Commission approval for discontinued operation extending beyond a 30 day period. Based upon information before us, in particular the May 6, 1992, declaration of Charles E. Giddens, Vice-President of Southern Broadcasting Companies, we found in the NAL that from at least the spring of 1991 until March, 1992, Southern Broadcasting Companies had discontinued operating Station WSTT without notification to or permission from the Commission.

3. In its responsive pleading, Southern Broadcasting Companies, through its President Paul C. Stone, states that it sought and obtained Commission permission to remain off the air from May 6, 1991, until August 6, 1991.[2] It follows from this showing, however, that from the period of August 7, 1991, when this permission expired, until March, 1992, when Southern Broadcasting Companies again requested permission to remain silent, Station WSTT was off the air without appropriate authority. Hence our finding of a violation of Section 73.1740(a)(4) remains valid.

4. Turning to Section 73.3526, our public file rule, the NAL found a violation of this provision on the basis of Charles E. Giddens' declaration that only a portion of the station's file was available to the public during the time that Station WSTT was off the air. In response, Southern Broadcasting Companies now offers the declaration of Helen Alligood, former office manager for Station WSTT, who states that during the period of April, 1991, until her retirement in February, 1993, she was a full time employee of Station WSTT, spending the majority of her work week at the station's business office in Thomasville where a complete public file was located and maintained. The transfer application was also located at another address in Thomasville, she states.

5. While we are troubled by the discrepencies between Mr. Giddens' initial declaration and Southern Broadcasting Companies' responsive filings, we will accept the latter in connection with this issue, primarily because it is supported by the declaration of someone with personal knowledge of the facts and circumstances involved. We thus find no violation of Section 73.3526.

6. Southern Broadcasting Companies asks that any forfeitures assessed against it be reduced if not rescinded. We agree. The forfeiture amount should be governed by the criteria established in our newly revised *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). Under these criteria, the base amount for an unauthorized discontinuance of service is $5,000. The portion of the forfeiture attributable to the apparent violation of Section 73.3526 will be rescinded in light of the licensee's response.

7. Accordingly, the response of Southern Broadcasting Companies, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. IT IS ORDERED, the Southern Broadcasting Companies, Inc., former licensee of Station WSTT, Thomasville, Georgia, FORFEIT to the United States five thousand dollars ($5,000) for its violation of Section 73.1740(a)(4) of the Commission's Rules. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

---

[1] An application for assignment of license of Station WSTT from Southern Broadcasting Companies, Inc., to Malren Broadcasting, Inc., was granted on December 30, 1992. The assignment was consumated on February 5, 1993.

[2] Mr. Stone terms Mr. Giddens' failure to mention the authorization to remain silent "inadvertent." He reports further that at the time Station WSTT discontinued operation, he was based in Athens, Georgia, while Mr. Giddens was based in Washington. To avoid the confusion that this situation seems to have caused, Mr. Stone states that Southern Broadcasting Companies has changed its operational policy so that all Commission-related items are routed directly to him.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Applications of

Butte County Cellular License Corp. — File No. 07393-CL-MP-92

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A, in Market 215, Chico, California

and

PacTel Cellular, Inc. of Rome, — File No. 08848-CL-MP-92

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A, in Market 373, Chattooga, Georgia

**MEMORANDUM OPINION & ORDER**

**Adopted: October 22, 1993; Released: November 2, 1993**

By the Chief, Mobile Services Division:

## I. INTRODUCTION

1. On July 14, 1992, Butte County Cellular License Corporation (Butte) filed the captioned application to increase the Cellular Geographic Service Area (CGSA) of its system in the Chico, California, Metropolitan Statistical Area (MSA) by modifying cells at Chico and Oroville, California, and adding a cell at Magalia, California.[1] On September 25, 1992, PacTel Cellular, Inc. of Rome (PacTel) filed an application to add a new cell at Summerville, Georgia (Summerville) to its system in the Chattooga, Georgia, Rural Service Area (RSA).[2] The Committee for Effective Cellular Rules (Committee) has filed petitions (Petitions) to dismiss, deny, or hold in abeyance the captioned applications. We are consolidating the proceedings because similar issues are raised. For the reasons discussed below, we deny both petitions.

## II. DISCUSSION

2. At the outset, Committee maintains that it has standing as an association to file the instant petitions by reason of an affidavit filed by one of its members which states, in pertinent part, that:

> if given an opportunity, I will file an application for the unserved area proposed to be served by the [instant] pending modification application[s].

Declaration of LeRoy Mathews Cluff, Committee Petitions, Attachment 1. Committee further appears[3] to reason that, because one of its members has demonstrated that it wants to file an application against Butte's application, Committee has standing as an association. Committee Petition, at 1. In its reply pleadings, Committee also cites to *Coalition for Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1355-56 (D.C. Cir. 1990) (*Coalition*), as support for Committee's proposition that a party that intends to file an application has standing. Committee Reply to Butte Opposition, at 3; Reply to PacTel Opposition, at 4. However, *Coalition* is inapposite to the instant case because there the court had ruled that the petitioners had standing to contest the Commission's approval of the transfer of a broadcast license in a renewal proceeding where all of the petitioners had "made unsuccessful attempts to become the licensee for the stations at issue" by bidding or competing for the license renewal. *Coalition*, 893 F.2d at 1356-67.

3. In contrast, Committee has made no attempt here to apply for either license at issue, and has only advanced the conditional statement of one of its members that he would apply "if given an opportunity." A mere stated intent to file an application in a particular market, as opposed to an actual interest in a filed application, does not suffice to give Committee standing. *See, e.g. GTE Mobilnet of Terre Haute Limited Partnership*, DA 92-1484 (Mobile Serv. Div. 1992) (recon. pending). Committee's interest in this proceeding, therefore, is too speculative to warrant a finding that it has standing. Nevertheless, we address the merits of Committee's petitions here as informal requests for Commission action. 47 CFR § 1.41.

4. Substantively, Committee contends that, although each of the instant applications was timely filed within the five-year fill-in period set forth in Section 22.31(a)(1)(i)[4] of the Rules, they should nonetheless be dismissed without preju-

---

[1] *See Public Notice*, Rep. No. CL-93-9 (Oct. 16, 1992).

[2] *Id.*

[3] In its petitions Committee states that:

> CECR [*i.e.* Committee] has participated extensively in [the unserved areas rule making proceeding] and has pending petitions for reconsideration with respect to the *First Report and Order*, 6 FCC Rcd 6185 (1991), and the *Second Report and Order*, 7 FCC Rcd 2449 (1992).

Committee Petitions, at 1. Committee fails to explain in its petitions how this assertion warrants a finding that it has standing. However, it later explains in one of its reply pleadings that its allusion to the unserved areas rule making proceeding, in itself, was not intended to show that it had standing, but rather, was "merely stated as a point of information that it participated [in the unserved areas proceeding] and has [filed] pending petitions for reconsideration." Committee Reply to Butte Opposition, at 3. We find Committee's rendition of its ongoing "extensive participation" in the unserved areas rule making proceeding to be irrelevant to the present issue of whether it has standing in a separate and unrelated adjudicatory proceeding, and otherwise find it to be a purely captious assertion.

[4] Section 22.31(a)(1)(i) provides, in pertinent part, that:

dice or held in abeyance "pending disposition" of its petition for rule making filed on August 18, 1992 (Petition for Rule Making), which is incorporated by reference. Committee Petitions, at 2. In the Petition for Rule Making, Committee requested repeal of Section 22.23(c)(3)(ii)[5] and modification of Sections 22.31(a)(1)(i) and 22.31(f)[6] of the Rules to allow for filing of competing applications against those filed by an incumbent cellular licensee to expand its CGSA. Petition for Rule Making, at 1-3.

5. We subsequently addressed Committee's Petition for Rule Making and dismissed it, finding that Committee's proposed rule changes were unwarranted because the rules in their existing form advance the competitive viability of cellular licensees and assure them of a five-year period in which to evolve their systems and fill in their respective MSAs or RSAs. Letter from Chief, Mobile Services Division, to Lewis J. Paper, Keck, Mahin & Cate (November 20, 1992) (appl. for review pending). We also rejected Committee's contentions that the rules in question violated Section 309(e) of the Communications Act of 1934, as amended, and *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), on the grounds that the Act allows the Commission to establish threshold qualification standards for applicants and to exclude those applicants that plainly fail to meet such qualifications. As we sufficiently addressed Committee's contentions in disposing of its Petition for Rule Making, we see no need to revisit them here. Furthermore, Committee has advanced no other reasons for granting the relief it requests.

## III. CONCLUSION

6. For the reasons discussed above, we deny both of Committee's petitions against Butte's and PacTel's applications. We conclude that Butte County Cellular Licensing Corp., and PacTel Cellular, Inc., of Rome, are legally, technically, and otherwise qualified to construct and operate the proposed facilities, and we further find that a grant of their applications will be in the public interest and will promote the efficient provision of service to the public.

## IV. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED THAT the Petitions to Deny filed by Committee for Effective Cellular Rules ARE DENIED.

8. IT IS ALSO ORDERED THAT the captioned application filed by Butte County Cellular Licensing Corp., File No. 07393-CL-MP-92, IS GRANTED.

9. IT IS FURTHER ORDERED THAT the captioned application filed by PacTel Cellular, Inc., of Rome, File No. 08848-CL-MP-92, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

---

> [n]otwithstanding any other provisions of the rule section and rule provision of this part, applications by other than licensees or grantees for a Metropolitan Statistical Area (MSA) to serve unserved areas outside the presently authorized CGSA but within the MSA will not be accepted for five years from the date of the grant of the original construction authorization of each system in an MSA.

[5] Section 22.23(c)(3)(ii) provides that an amendment shall be treated as major if it would:

> [a]fter the five year fill-in period, increase the Cellular Geographic Service Area (CGSA) beyond that proposed in the application.

[6] Section 22.31(f) provides, in pertinent part, that:

> [a]pplications by entities other than licensees or grantees for a particular RSA to serve unserved areas outside the presently authorized CSGA but within the Rural Service Area (RSA) will not be accepted for five years from the grant of the initial construction authorization of each frequency block in an RSA.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

JC Computer
Warehouse
Industry, CA

NAL/Acct. No. 315HF0013

## NOTICE OF APPARENT LIABILITY

**Adopted: October 25, 1993; Released: November 2, 1993**

By the Field Operations Bureau:

### I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, ("the Act"), 47 U.S.C.§ 503(b), to JC Computer Warehouse (JC Computer) for willful violation of Section 302(b) of the Act and Section 2.803 of the Federal Communications Commission's (FCC or Commission) Rules, 47 C.F.R. § 2.803. In November 1992, JC Computer advertised two models of a Class B computer in a trade publication as being "FCC Class B approved." Commission records indicate that no grant of authorization was ever issued to JC Computer for either model of the advertised computer.

2. The appropriate amount of forfeiture for this violation is $14,000.

### II. BACKGROUND

3. On November 30, 1992, the Authorization and Evaluation Division's Laboratory of the Office of Engineering and Technology (OET) notified JC Computer of its possible violation of Commission Rules that prohibit the marketing, including advertising without disclaimers, of equipment which has not been certified or properly authorized by the FCC. The OET also requested that JC Computer provide written statements, documentation or information regarding any possible grants of authorization for the disputed equipment (486/33 "baby tower" and a 386/25 "mini tower computer"), or, in the alternative, any documentation regarding what steps were being taken to prevent further marketing of the equipment.

4. JC Computer failed to respond to this notice within the 30 days allotted, and in fact, has yet to respond.

### III. DISCUSSION AND CONCLUSION

5. Section 2.803 of the Commission's Rules prohibits the sale, or offer for sale, or lease, including advertising for sale or lease, of equipment which is required to have, but has not been granted, type approval, type acceptance, certification or notification.[1] The requirement that the computer devices be certified, is found under Section 15.101 of the Rules. 47 C.F.R. § 15.101.

6. A search of Commission authorization records indicated that although JC Computers held grants for a 486/33MHz, under FCC ID IJ7486DX33ICS704, and a 386SX25MHz, under FCC ID IJ7JCC838625MC106 these grants only authorized a full size tower computer (for the 486/33 MHz), not a "baby tower", and a desktop computer (for a 386SX25 MHz), not a "mini tower" computer. Under FCC Rules a grant of authorization only covers the type of equipment described in the grant application. JC Computers could still have avoided a violation of the Rules by posting a conspicuous disclaimer informing the public that the devices were not authorized and were not for sale. Since no such disclaimer accompanied the ads for the two computers, JC Computers is deemed to have offered them for sale. Further, the advertisement included a false statement that the equipment was "FCC Class B approved."

7. JC Computer is a holder of various grants of equipment authorization, and is familiar with the Commission's equipment authorization procedures. JC Computer's action, therefore, of offering the unauthorized personal computer models for sale with a false statement claiming FCC authorization, appears to be not merely willful, but intentional.[2]

8. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base amount for the unauthorized marketing of radiofrequency devices is $7,000. The appropriate amount of forfeiture for both of these violations is $14,000. No further adjustments appear warranted.

### V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that JC Computer Warehouse, is APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $14,000 for marketing unauthorized equipment in violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set out in Section 503(b) of the Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that JC Computer Warehouse, shall, within, thir-

---

[1] This provision also provides that the advertising or display of a device will not be deemed an offer for sale or lease if the advertisement or display includes a conspicuous notice stating that the device has not been approved by the Commission, and may not be sold or leased until such approval is obtained.

[2] Section 312(f)(1) of the Communications Act, which also applies to Section 503(b)(*see Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991) provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or Commission Rules.

ty (30) days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[3] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No. 315HF0013 Response
Room 744, Mail Stop No. AC/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 315HF0013" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to JC Computer Warehouse, 17990 East Ajax Circle, City of Industry, CA 91748.

FEDERAL COMMUNICATIONS COMMISSION

Mary B. Richards
Chief, Enforcement Division

[3] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-219**

In the Matter of

Amendment of Section 73.202(b), RM-8290
Table of Allotments,
FM Broadcast Stations.
(Staples, Minnesota)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1993; Released: November 2, 1993**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5199 (1993), issued in response to a petition filed by David J. DeLaHunt d/b/a Normin Broadcasting Company ("petitioner"), proposing the substitution of Channel 234C3 for Channel 234A at Staples, Minnesota. Petitioner also requested modification of its construction permit for Station KSKK, Channel 234A, to specify operation on Channel 234C3. Petitioner filed comments in which it reaffirmed its interest in the channel.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 234C3 for Channel 234A at Staples, since it would provide expanded local FM service to the community. The substitution can be made in compliance with the Commission's spacing requirements at petitioner's specified site.[2] Since Staples is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the construction permit for Station KSKK, Staples, Minnesota, to specify operation on Channel 234C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Staples, Minnesota | 234C3 |

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KSKK, Staples, Minnesota, IS MODIFIED to specify operation on Channel 234C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Normin Broadcasting Company, permittee of Station KSKK, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In response to the *Notice*, petitioner also provided an affidavit verifying the statements in the petition.
[2] The coordinates for Channel 234C3 at Staples are 46-23-29 and 94-57-21.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-210**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b) | RM-8283 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Webster Springs, West Virginia) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1993; Released: November 2, 1993**

By the Assistant Chief, Allocations Branch:

1. At the request of Cat Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4932 (1993), proposing the substitution of Channel 262B for Channel 262A at Webster Springs, West Virginia, and the modification of its construction permit (File No. BMPH-930618IE) to specify operation on the higher powered channel.[1] Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 262B for Channel 262A at Webster Springs, West Virginia, since it would provide the community with a wide coverage area FM service. Channel 262B can be allotted to Webster Springs in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit to specify operation on Channel 262B at Webster Springs.

3. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to conform with the notification requirements of Section 73.1030(a) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Webster Springs, West Virginia | 262B |

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Cat Radio, Inc., IS MODIFIED to specify operation on Channel 262B, in lieu of Channel 262A at Webster Springs, West Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Cat Radio, Inc., is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As indicated in the *Notice*, petitioner's construction permit (File No. BPH-920507MB) for Channel 262A at Webster Springs was granted on June 11, 1993. On June 18, 1993, petitioner filed an application to modify its construction permit which was granted on July 23, 1993.

[2] The coordinates for Channel 262B at Webster Springs are North Latitude 38-28-42 and West Longitude 80-24-54.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-147**

In the Matter of

Amendment of Section 73.202(b), RM-8232
Table of Allotments,
FM Broadcast Stations.
(Volcano, Hawaii)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1993; Released: November 2, 1993**

By the Assistant Chief, Allocations Branch:

1. At the request of Li Hing Mui, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 3910 (1993), proposing the substitution of Channel 299C1 for Channel 299A at Volcano, Hawaii, and modification of Station KKOA(FM)'s construction permit to specify the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 299C1 for Channel 299A at Volcano, Hawaii, as it would provide the community with a wide coverage area FM service.[1] Channel 299C1 can be allotted to Volcano in compliance with the Commission's minimum distance separation requirements at petitioner's desired transmitter site with a site restriction of 2.5 kilometers (1.6 miles) west.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KKOA(FM) to specify operation on Channel 299C1 at Volcano, Hawaii.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 17, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

| City | Channel No. |
|---|---|
| Volcano, Hawaii | 299C1 |

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KKOA(FM), Volcano, Hawaii, IS MODIFIED, to specify operation on Channel 299C1 in lieu of Channel 299A. As noted, the construction permit modification is conditioned on the outcome of T.C. Monte's pending appeal, see fn. 1 supra. This modification is subject to the following conditions:

(a) Within 90 days of the effective date of the pending appeal in T.C. Monte, Inc. v. FCC, Case No. 92-1663, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Li Hing Mui, Inc., permittee of Station KKOA(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] There is currently pending before the Court of Appeals a request by T.C. Monte, Inc., to review the Commission's decision to dismiss its application (BPH-900220MH) for Channel 299A at Volcano, Hawaii. *See Memorandum Opinion and Order*, 7 FCC Rcd 7572 (1992). Therefore, the grant of this substitution of Channel 299C1 for Channel 299A at Volcano, Hawaii, is conditioned upon the outcome of the appeal, *T.C. Monte v. FCC*, Case No. 92-1663.

[2] The coordinates for Channel 299C1 at Volcano are North Latitude 19-26-00 and West Longitude 155-15-42.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-28**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8172 |
| Table of Allotments, | RM-8299 |
| FM Broadcast Stations. | |
| (Colonial Heights, Tennessee) | |

**ORDER TO SHOW CAUSE**

**Adopted: October 18, 1993; Released: November 2, 1993**

**Comment Date: December 27, 1993**

By the Assistant Chief, Allocations Branch:

1. The Commission issued the *Notice of Propose Rule Making* in this proceeding, 8 FCC Rcd 1794 (1993), in response to a petition filed by Murray Communications ("petitioner"), permittee of Channel 290A, Colonial Heights, Tennessee, proposing the substitution of Channel 290C3 for Channel 290A at Colonial Heights and modification of petitioner's authorization accordingly. Petitioner filed comments, as well as a counterproposal.[1]

2. Petitioner's counterproposal requests the substitution of Channel 240C2 or, alternatively, Channel 240C3 for Channel 290A at Colonial Heights, Tennessee, and modification of its construction permit to specify the higher powered channel.[2] In order to accommodate this proposal, petitioner also requests the substitution of Channel 290A for Channel 231A at Tazewell, Tennessee, Channel 231A for Channel 240A at Morristown, Tennessee, Channel 252A for Channel 290A at Whitley City, Kentucky, and a change of site for Station WAEY-FM, Princeton, West Virginia.[3] Petitioner acknowledges its responsibility to compensate the licensees of Stations WCTU-FM and Station WMXK-FM for the reasonable expenses they would incur in changing channels and the licensee of Station WAEY-FM for the reasonable expenses it would incur in changing its transmitter site.

3. The Commission has made a preliminary determination that the public interest would be advanced by proposing the above-noted channel changes to accommodate petitioner's upgrade proposal at Colonial Heights. A final determination regarding this amendment to the Table must await the outcome of the Show Cause Orders concerning the license modification of Station WCTU-FM, Tazewell, Tennessee, and Station WMXK-FM, Morristown, Tennessee, as discussed herein. Although the licensees of Stations WCTU-FM and Station WMXK-FM are provided an opportunity to object to the ordered channel changes, this Order does not afford additional opportunity either to comment on the merits of the conflicting proposals or for the acceptance of additional counterproposals.

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, WFSM, Inc., and Franklin Communications, Inc., respective licensees of Station WCTU-FM, Tazewell, Tennessee, and Station WMXK-FM, Morristown, Tennessee, SHALL SHOW CAUSE why their licenses SHOULD NOT BE MODIFIED to specify operation on Channel 290A and 231A as proposed herein instead of the present Channel 231A and Channel 240A, respectively.

5. Pursuant to Section 1.87 of the Commission's Rules, WFSM, Inc. and Franklin Communications, Inc. may, not later than **December 27, 1993,** file a written statement showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on WFSM, Inc. and Franklin Communications to furnish additional information. If WFSM, Inc. or Franklin Communications, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, WFSM, Inc. and Franklin Communications Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order to Show Cause* to

WFSM, Inc.
P.O. Box 1409
Lafollette, Tennessee 37766
(Licensee of Station WCTU-FM)

Franklin Communications, Inc.
510 West Economy Road
Morristown, Tennessee 37814
(Licensee of Station WMXK-FM)

---

[1] Public Notice of the counterproposal was given July 29, 1993, (corrected August 3, 1993) Report No. 1955.

[2] The coordinates for Channel 240C2 at Colonial Heights are North Latitude 36-35-35 and West Longitude 82-37-16. The coordinates for Channel 240C3 at Colonial Heights are North Latitude 36-31-36 and West Longitude 82-35-14.

[3] The three substitutions required for Channel 240C2 are also required for Channel 240C3. In this regard, we note that Station WHAY-FM has consented in advance to the channel change at Whitley City, Kentucky, and Station WAEY-FM also agreed to relocate its transmitter site to the extent necessary to clear the proposed substitution of Channel 240C2 for Channel 290A at Colonial Heights.

7. A copy of any comments filed by WFSM, Inc. or Franklin Communications, Inc. in this proceeding should be served on the following party:

Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, Tennessee 37027-0986
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

TN Technologies, Inc. NAL/Acct No. 415HF0002
Round Rock, Texas

Liability for
Monetary Forfeiture

## NOTICE OF APPARENT LIABILITY

**Adopted: October 26, 1993; Released: November 2, 1993**

By the Field Operations Bureau:

### I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 C.F.R. §503(b), and 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, to TN Technologies, Inc. for violation of Section 2.803 of the Commission's Rules. 47 C.F.R. § 2.803.

2. The appropriate amount of forfeiture for this violation is $7,000.

### II. BACKGROUND

3. Based on a February 17, 1993 complaint, the Commission's Field Operations Bureau, wrote to TN Technologies, Inc., on April 2, 1993, inquiring whether TN Technologies held a grant of authorization to market its CannonBear 1220 and the CannonBear 1420 fluid-level measurement devices.[1] At that time we also requested that the company cease marketing this equipment if it held no proper authorization, and provide us with the name and address of the supplier and manufacturer of the devices. On April 26, 1993, TN responded. In its response, the company asserted that it held no grant of authorization for its devices, but did not need one because it considered the devices to be Part 18 industrial equipment.

### III. DISCUSSION

4. In its response, TN contends that the devices at issue qualify as Part 18 industrial, scientific and medical (ISM) equipment requiring neither certification nor type acceptance. TN argues that these devices have a "classic Part 18 application," as defined in Section 18.107(c), 47 C.F.R. § 18.107(c), in that the units "generate RF energy and use it locally within an industrial tank for industrial measurement and control purposes." Alternatively, TN argues, the devices should be considered as verifiable Part 15 devices similar to tunnel radio transmitters because they are operated in an environment that provides RF energy attenuation.

5. Citing to the decision in *Satellite Broadcasting Co., Inc. v. FCC*, 824 F. 2d 1, 3-4 (D.C. Cir. 1987), TN Technologies argues that due process considerations demand that the Commission not pursue enforcement action against the company for acting based on a reasonable interpretation of Commission Rules. TN Technologies, Inc. also argues that "'elementary fairness requires clarity of standards sufficient to apprise [one] of what is expected,'" and that the Commission has not provided sufficient notice of its interpretation of this standard to justify the kind of economic hardship that would result from an interpretation which is contrary to TN's.

6. Contrary to TN Technology's assertions, the Commission has provided ample notice of the way it interprets Part 15 and Part 18 devices through several rulemaking proceedings. *See 3rd Notice of Proposed Rulemaking*, Docket No. 13863, para. 21, 35 Fed. Reg. 18674 (December 9, 1970); *Notice of Proposed Rulemaking*, Docket No. 18260; and *Report and Order*, Docket No. 18260; *Amending Part 15 To Provide for RF Operated Measuring Devices*, 20 FCC 2d 158 (1969).[2] As TN itself has acknowledged, competitors marketing competing devices have obtained grants of authorization under Part 15. In fact, CannonBear, which was later merged with TN, obtained Part 15 certification for the CannonBear 1, the prototype for the CannonBear 1220 and 1420, as a field disturbance sensor.

7. Under the Commission's Rules, all radio equipment must comply with FCC equipment authorization procedures before it can be marketed or imported in the U.S. The type of equipment authorization procedure which applies depends upon the service in which the device will be used. Devices which are regulated by Part 15 must generally be certified, with certain exemptions; devices which are regulated by Part 18 may be authorized by either verification (self-approval) or type acceptance procedures.[3]

8. TN Technologies also argues that, even assuming that the Commission had provided guidelines for interpreting its Rules regarding the licensing of these devices, it has "blurred the distinction" between Part 15 and Part 18

---

[1] The CannonBear 1220 and 1420 are level-detection devices which use microwaves to determine when fluid in a tank reaches a certain level.

[2] In its *Report and Order* amending Part 15 to provide for RF operated measuring devices, the Commission declared that measuring devices could not be accommodated under Part 18. This rulemaking was adopted to respond to petitions filed by two companies for clarification of the Commission's categorization of measuring devices such as a thickness gauge and a moisture detection device. The Commission declared that since these devices performed communications functions, they could not be accorded Part 18 treatment as industrial devices. The definition of Part 18 devices continues to specifically exclude telecommunications function. *See* 47 C.F.R. §§ 18.107(c), 2.1.

[3] *Communications* devices designed to relay some piece of intelligence or information using low level of radio signals are generally regulated under Part 15. Part 18 devices involve the generation of a substantial amount of RF energy used to produce "physical, biological, or chemical effects such as heating, ionization of gases, mechanical vibrations, hair removal and acceleration of charged particles." *See* 47 C.F.R. § 18.107(c).

categories by according Part 18 treatment to Magnetic Resonance Imagery (MRI) equipment, which, TN Technology argues, is a communications device, and similar to its device in critical respects. According to TN Technologies, its devices, similar to MRI systems, generate and use RF energy to measure the size, position and composition of irradiated objects. TN Technologies further argues, that any other interpretation would run counter to the Court's directive in *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) that similarly situated parties be treated similarly.

9. We disagree with TN's position that its device is analogous to MRI equipment. TN Technology's fluid-level detector simply provides a "reading" of the fluid level by bouncing radio waves back, and fail to meet the requirement that a Part 18 device must have an application which produces some "physical, biological, or chemical effect". MRIs meet this requirement because they produce physical, biological changes, albeit temporary, upon the molecular structure of cells. Further, MRIs by their design and installation, operate in an environment in which they are shielded from radio signals; these same shields prevent radiation of the radio signals to the outside environment. The attenuation factors provided by the tanks in which TN Technologies' fluid-level detectors are placed may vary with each tank, since the company does not control the type of tanks in which they are placed.

10. For similar reasons, we also reject TN Technologies' argument that the device could be considered a verified Part 15 device, as a tunnel radio system. Section 15.211(a), 47 C.F.R. § 15.211(a), requires that such a system be "contained solely within a tunnel, mine or other structure that provides attenuation to the radiated signal due to the presence of naturally surrounding earth and/or water." The attenuation factors which could be provided by a naturally occurring structure of land or water would not vary as widely as those provided by tanks provided by purchasers of the device. Finally, the water provided in a tank does not fit the definition of a naturally occurring shield.

## IV. CONCLUSION

11. Pursuant to the Commission's policy for assessing forfeitures, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) ( *Policy Statement)*, and Section 503(b)(2) of the Act, the base forfeiture amount for marketing devices in violation of Commission certification requirements under Section 2.803 of the Rules is $7,000. No further adjustments appear warranted.

## V. ORDERING CLAUSES

12. Accordingly, pursuant to Section 503(b) of the Communications Act, and Section 1.80 of the Commission's Rules, IT IS ORDERED, that TN Technologies IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of seven thousand dollars ($7,000) for willful violation of Section 302 of the Communications Act, and Section 2.803 of the Commission's Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, that TN Technologies shall, within 30 days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[4] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division, RM 744
1919 M Street, N.W., Mail Stop AC/1500E3
Washington, D.C. 20554
Attn: NAL Acct. No. 315HF0035

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 315HF0035" and mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

14. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, return-receipt requested, to TN Technologies and its attorneys.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division

[4] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 25, 1993**

**Advisory Committee on Advanced Television Service**

A meeting of the Advisory Committee on Advanced Television Service will be held on:

November 8, 1993
2:00 P.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introductory Remarks of Advisory Committee Chairman Richard E. Wiley
2. Adoption of Minutes of the Last Meeting
3. Remarks by FCC Chairman and/or Commissioners
4. Report of the Technical Subgroup
5. Future Work Plans
6. Financial Report
7. Other Business
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Advisory Committee Chairman. Shorter notice of this meeting is provided because rapidly developing technical advances are stayed pending Advisory Committee authorization.

Any questions regarding this meeting should be directed to Richard E. Wiley at (202) 429-7010 or William H. Hassinger at (202) 632-6460.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 22, 1993**

**Broadband Personal Communications Devices (Unlicensed)**

**GEN Docket No. 90-314**

In a petition filed on September 13, 1993, Apple Computer, Inc. (Apple) addressed certain issues related to operation of unlicensed Personal Communication Service (PCS) devices in the 2 GHz band. Subsequently, on September 23, 1993, the Commission adopted a *Second Report and Order* in GEN Docket No. 90-314 allocating the 1890-1930 MHz band for unlicensed devices and dividing the band equally between isochronous (principally voice) and asynchronous (data) operations. Technical rules also were adopted that are based upon a proposal submitted by WINForum, an industry group consisting of representatives of both data and voice unlicensed proponents. The rules adopted are intended to facilitate efficient use of the 2 GHz unlicensed band by both data and voice users and to minimize in-band and out-of-band interference. Further, the Commission selected the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM), an industry group interested in the deployment of unlicensed devices, to coordinate the deployment of unlicensed devices with incumbent fixed microwave operations.

Apple's petition was filed three days before operation of the Commission's Sunshine Rule prohibited interested parties from filing additional comment on the proceeding as a whole, including on the Apple petition. *See* 47 C.F.R. § 1.1203 *et seq.* Consequently, parties generally did not have an opportunity to file comments supporting or opposing the petition.[1] While the Commission adopted rules that respond to and consider the issues raised by Apple in its petition, the Commission stated in the *Second Report and Order* in this proceeding that it would be in the public interest to obtain comment on the petition in order that the Commission may be fully informed by all interested parties on these issues. Therefore, in the *Second Report and Order* the Commission said it would treat Apple's "Emergency Petition" as a Petition for Reconsideration and delayed for an additional 30 days the effective date of its adopted rules that relate to the issues addressed in Apple's petition for the purpose of obtaining comment on these issues.

Parties desiring to file comments addressing the issues raised in Apple's petition must reference GEN Docket No. 90-314 on the cover of their comments. Comments must be submitted by **November 8, 1993**. Replies to comments must be submitted by **November 19, 1993**.

The Apple petition, the WINForum comments and other related documents are available for inspection in the GEN Docket No. 90-314 file at the FCC Reference Center (Room 239), 1919 M Street N.W., Washington, DC 20554. Copies also may be obtained from the International Transcription Service, (202) 857-3800. For further information, contact Fred Thomas, Office of Engineering and Technology, (202) 653-6204.

[1] In response to Apple's petition, comments were filed prior to issuance of the Sunshine Notice on September 16, 1993 by the Utilities Telecommunications Council, the American Petroleum Institute and the Business Software Alliance.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GTE Service Corporation,
its affiliated domestic
Telephone Operating Companies and
the GTE System Telephone Companies

Petition for Waiver of Section
69.3 of the Commission's Rules

**ORDER**

**Adopted: October 27, 1993; Released: October 28, 1993**

By the Acting Chief, Common Carrier Bureau:

1. On August 25, 1993, the GTE Service Corporation, its affiliated domestic Telephone Operating Companies and the GTE System Telephone Companies (GTE) filed a petition for waiver of Sections 69.3(e)(6), 69.3(e)(11) and 69.3(i)(1) of the Commission's rules, 47 C.F.R. §§ 69.3(e)(6), 69.3(e)(11), 69.3(i)(1). The requested waiver, if granted, would permit GTE to remove certain telephone exchange assets from the National Exchange Carrier Association (NECA) pools outside of the normal time frame for entering or leaving these pools. GTE plans to purchase certain exchanges in Indiana, Illinois and Michigan from ALLTEL Corporation (ALLTEL). GTE seeks to remove the Illinois and Michigan study areas from the NECA common line pool and the Indiana study area from both the common line and traffic sensitive pools.[1]

2. GTE asserts that, under the Commission's rules, the acquired exchanges would remain in the NECA pools until July 1, 1994, the effective date of the next annual price cap filing. However, GTE wishes to have appropriate tariff changes in effect immediately upon completion of its acquisition, currently scheduled for November 1, 1993.[2] GTE argues that removing these acquired exchanges from the NECA pools and including them in the existing GTE price cap tariffs will result in access rate reductions for customers of approximately $1.3 million. GTE further contends that the immediate inclusion of the acquired exchanges in GTE's existing tariff will benefit the public by providing consistent access charges for customers in the combined GTE and ALLTEL service areas and by permitting GTE to avoid administrative expenses associated with the maintenance of separate billing and reporting systems for exchanges that remain in the NECA pools.[3] GTE's waiver request is unopposed by NECA,[4] or by any other party.

3. We conclude that there is good cause to grant GTE a waiver of Sections 69.3(e)(6), 69.3(e)(9) and 69.3(i)(1) of the Commission's rules. The specific rules for which GTE seeks waiver require notice to NECA of intent to leave the pools[5] and specify effective dates for changes in Long Term and Transitional Support resulting from merger or acquisition.[6] We agree with GTE that compliance with these rules will impose upon it substantial added administrative expense. We also agree with GTE that waiver of these rules will result in significant, immediate price reductions and uniformity within specific study areas. Grant of this waiver will not adversely impact NECA. Finally, the Commission's price cap rules, which specifically require the conversion of acquired rate of return regulated exchanges to price cap regulation, favor the outcome GTE seeks to expedite.[7] We therefore grant waiver of the rules as requested by GTE in its petition.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Section 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91, 0.291, that the petition for waiver of Sections 69.3(e)(6), 69.3(e)(9) and 69.3(i)(1) of the Commission's rules, 47 C.F.R. §§ 69.3(e)(6), 69.3(e)(9) and 69.3(i)(1), filed by GTE Service Corporation, the GTE Telephone Operating Companies, and the GTE System Telephone Companies, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

---

[1] GTE Petition at 1.
[2] *Id.* at 3.
[3] *Id.* at 3-4.
[4] NECA filed no comments on the waiver request. In addition, NECA told the Bureau orally that it had no objection to GTE's request and would experience no adverse impact if the waiver is granted.
[5] *See* 47 C.F.R. §§ 69.3 (e)(6) and 69.3 (i)(1).
[6] *See* 47 C.F.R. § 69.3 (e)(9).
[7] *See* 47 C.F.R. §§ 61.41 (c) and (d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 29, 1993**

## FCC ANNOUNCES 1994 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR LICENSE EXAMINATION

The FCC announced today that effective January 1, 1994, the maximum allowable reimbursement fee for an amateur operator license examination will be $5.75. This amount is based upon a 2.7% increase in the Department of Labor Consumer Price Index between September 1992 and September 1993.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating examinations for amateur operator licenses. The amount of any such reimbursement fee from any one examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

This announcement is made pursuant to Section 97.527 of the Commission's Rules, 47 C.F.R. § 97.527.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**October 26, 1993**

**Released: November 3, 1993**

Richard J. Bodorff, Esq. 1800C1-MGK
Todd M. Stansbury, Esq. 93100838
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Gentlemen:

On behalf of Minnesota Public Radio (MPR), you seek waiver of Section 73.503(d) of the Commission's Rules to permit on-air fund raising for the St. Paul Chamber Orchestra (SPCO).[1] MPR proposes, in this regard, a one time phone-in pledge-oriented fundraiser, tentatively scheduled to occur over a thirty-five hour period beginning October 29 and ending October 30, 1993. Programming would consist primarily of prior SPCO performances and interviews with SPCO principals and supporters, and would replace previously scheduled classical music broadcasts.

You acknowledge that Commission policy generally prohibits noncommercial stations from engaging in fundraising activities on behalf of any entity other than the licensee where such activities substantially alter or suspend regular programming. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 90 FCC 2d 895, 907 (1982). You submit, however, that unique facts and circumstances warrant waiver in this particular case. Thus, you note that SPCO is an institution of international acclaim whose broadcasts have been produced and distributed by MPR to its own stations since 1968, and to American Public Radio for national distribution since 1980. For the 1993 broadcast season, you continue, the orchestra's weekly programs were carried on 125 radio stations with an overall audience reach of more than 3.6 million people.

Notwithstanding its artistic accomplishments, you state, SPCO finds itself in severe financial distress, with a substantial operating deficit for the existing year. Immediate and extraordinary efforts are essential to keep the orchestra alive, you assert. The survival of this critical provider of classical music programming, for MPR in particular and for the nation as a whole in general, combined with the long and beneficial relationship between MPR and SPCO, present precisely the kind of circumstances justifying waiver, you conclude.

In *Cohn and Marks*, 51 RR2d 659 (1982), we granted a waiver comparable to the one sought here to permit the Greater Washington Educational Telecommunications Association, Inc., licensee of noncommercial educational television station WETA-TV, Washington, D.C., to conduct a broadcast fundraiser for the Wolf Trap Foundation, the money to be used toward rebuilding the Filene Center at Wolf Trap Farm Park. Identifying the intent of our regulations as preserving "the primarily educational, instructional, and cultural character of public broadcast programming," 51 RR2d at 660, we found in Wolf Trap Farm's status as a source of programming for stations throughout the country, in the limited duration of the proposed programming, and in the nature of that programming--namely excerpts from previous presentations mixed with interviews with and performances from stars who had appeared at Wolf Trap over the years--grounds for concluding that this intent would best be served by waiver under the circumstances.

We likewise conclude here that waiver would serve the public interest. MPR and SPCO have established a long and beneficial relationship, serving MPR listeners for 25 years and national listeners for 13 years. SPCO is now a significant source of progrmming for both MPR itself and for noncommercial radio stations across the country. Its loss would thus be a major one. MPR, for its part, proposes a limited fund raising effort which would maintain the existing programming format, *i.e.* classical music interspersed with interviews. These considerations combine to constitute special and unique circumstances justifying waiver.

Accordingly, your request on behalf of Minnesota Public Radio for waiver of Section 73.503(d) of the Commission's Rules to permit noncommercial educational radio stations licensed to it to engage in on-air fund raising consistent with this letter is granted.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

[1] The following noncommercial educational radio stations licensed to MPR are included in the request: KLCD, Decorah, IA; WSCD, Duluth/Superior, MN; KCCM, Fargo, ND/Moorhead, MN; KSJN, Minneapolis/St. Paul, MN; KSJR, St. Cloud/Collegeville, MN; KGAC, St. Peter/Mankato, MN; KQMN, Thief River Falls, MN; KWRV, Sun Valley, ID; KRSU, Appleton, MN; KCRB, Bemidji/Grand Rapids, MN; KBPR, Brainard, MN; WGGL, Houghton, MI; KLSE, Rochester/Winona, MN; KRSD, Sioux Falls, SD; WIPR, Virginia/Hibbing, MN; KRSW, Worthington/Marshall, MN.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-274**

In the Matter of

Amendment of Section 73.202(b), RM-8372
Table of Allotments,
FM Broadcast Stations.
(Ely, Nevada)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 20, 1993; Released: November 3, 1993**

**Comment Date: December 27, 1993**
**Reply Comment Date: January 11, 1994**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 243A to Ely, Nevada, as the community's third local FM service. Petitioner states that he will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 243A to Ely, since it could provide the community with an additional local transmission service. Channel 243A can be allotted to Ely in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Ely, Nevada | 224C3, 269C3 | 224C3, 243A, 269C3 |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1993,** and reply comments on or before **January 11, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner, in addition to providing locally-oriented service to Ely, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Alamo, Cherry Creek, Austin, Baker, Lund, Pioche and Eureka, Nevada.

[2] The coordinates for Channel 243A at Ely are North Latitude 39-14-51 and West Longitude 114-53-16.

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-276**

In the Matter of

Amendment of Section 73.202(b), RM-8353
Table of Allotments,
FM Broadcast Stations.
(Franklinton, Louisiana)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 19, 1993; Released: November 3, 1993**

**Comment Date: December 27, 1993**
**Reply Comment Date: January 11, 1994**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by GACO Broadcasting Corporation ("petitioner"), requesting the allotment of Channel 255A to Franklinton, Louisiana, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 255A to Franklinton, since it could provide the community with its first local FM service.[1] Channel 255A can be allotted to Franklinton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Franklinton, Louisiana | -- | 255A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1993,** and reply comments on or before **January 11, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Julian P. Freret, Esq.
Booth, Freret & Imlay
Suite 204
1233 20th Street, N.W.
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Station WFCG(AM) is licensed to Franklinton.
[2] The coordinates for Channel 255A at Franklinton are North Latitude 30-50-54 and West Longitude 90-09-18.

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-275**

In the Matter of

Amendment of Section 73.202(b), RM-8373
Table of Allotments,
FM Broadcast Stations.
(Pioche, Nevada)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 20, 1993; Released: November 3, 1993**

**Comment Date: December 27, 1993**
**Reply Comment Date: January 11, 1994**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Keith E. Lamonica ("petitioner") requesting the allotment of Channel 255A to Pioche, Nevada, as the community's first local aural transmission service. Petitioner states that he will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 255A to Pioche since it could provide the community with its first local aural transmission service. Channel 255A can be allotted to Pioche in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Pioche, Nevada | -- | 255A |

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1993,** and reply comments on or before **January 11, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with: the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Keith E. Lamonica
501 Aultman
Ely, Nevada 89301
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner, in addition to providing locally-oriented service to Pioche, desires to construct several stations and "tie them together" as one network. To this end, he has also proposed the allotment of FM channels at Alamo, Cherry Creek, Austin, Baker, Lund, Ely and Eureka, Nevada.

[2] The coordinates for Channel 255A at Pioche are North Latitude 37-55-47 and West Longitude 114-27-05.

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PR Docket No. 93-267**

In the Matter of

Amendment of the Amateur Service Rules to Extend Temporary Operating Authority to New Amateur Operators. RM-8288

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 21, 1993; Released: November 4, 1993**

**Comment Date: January 10, 1994**
**Reply Comment Date: February 10, 1994**

By the Commission:

## I. INTRODUCTION

1. On June 28, 1993, the Western Carolina Amateur Radio Society/VEC, Inc. (Wescars) filed a petition (RM-8288) for amendment of the amateur service rules. Wescars asks for a rule that would grant immediate temporary operating authority to persons who pass the examinations for a new amateur operator license. In response to the petition, we propose to amend the rules to provide such temporary operating authority.

## II. BACKGROUND

2. Section 97.9 of the Commission's Rules, 47 C.F.R. § 97.9, currently authorizes immediate temporary operating privileges to amateur operators who upgrade their class of license.[1] An amateur operator who has passed the required examination, and who has properly submitted to the volunteer examiners (VEs) an application for the higher class of operator license, is authorized to exercise the rights and privileges of the higher class license immediately. A Certificate of Successful Completion of Examination (CSCE)[2] is the visible evidence of the applicant's operating authority until receipt of the license. This procedure allows successful examinees to enjoy their new privileges immediately. The procedure, however, does not apply to those successful examinees who do not already hold a valid license. A new amateur operator must wait several weeks for the application to be processed and a license granted before commencing operation. Resources that would otherwise be required to respond to inquiries from the applicants concerning processing status, moreover, can be applied to other licensing tasks.

## III. DISCUSSION

3. In support of its petition, Wescars states that by providing immediate temporary operating authority to all successful examinees, the Commission would be rendering a great service to new members of the amateur service community.[3] With such authority, a person who passes the examinations would not have to wait to receive the license (from four to eight weeks) before commencing operation. Wescars also states that providing temporary operating authority would result in cost savings for the Commission because there would be a reduction in the number of inquiries by persons checking on the status of their license applications. Amateur operator license applicants make approximately 11,000 status inquiries annually. Answering such inquiries diverts resources from the processing of license applications.

4. To better serve new amateur operators and to increase productivity in the processing of license applications, we propose to amend Section 97.9 to extend temporary operating authority to new successful examinees until receipt of the full-term license.[4] The temporary operating authority, however, would not be available to any prior amateur service licensee whose license was revoked, suspended, or surrendered for cancellation following notice of revocation, suspension, or monetary forfeiture proceedings. Nor would it be available to any person who is the subject of a cease and desist order that relates to amateur service operation and which is still in effect. Language to cover these restrictions is contained in the proposed rules. Neither would it authorize any station operation that may have a significant environmental effect as defined by Section 1.1307 of the Commission's Rules, 47 C.F.R. § 1.1307. Also, the temporary authority would terminate, if the application is returned without action. In addition, the proposed rules provide that the Commission, in its discretion, may cancel the temporary operating authority without a hearing, if the need for such action arises.

5. Under Section 4(f)(4)(B) of the Communications Act, 47 U.S.C. § 154(f)(4)(B), we accept and employ the services of volunteers to administer amateur operator license examinations. Section 97.17(c) of the Commission's Rules, 47 C.F.R. § 97.17(c), requires the administering VEs to receive, as part of administering an examination, on behalf of the Commission, the application from the applicant.[5] The filing requirement contained in Section 308(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(a), therefore, is satisfied.[6] Moreover, there is ample precedent

---

[1] During 1992, 24,441 amateur operators upgraded their class of license.

[2] In the amateur service, a CSCE is issued by volunteer examiners (VEs) to each examinee who passes an examination element.

[3] During 1992, 44,738 persons passed the examinations for new amateur operator licenses.

[4] In its petition, Wescars would have the temporary operating authority be valid for 365 days. We propose, however, to limit the temporary authority to 120 days because a full-term license would normally be issued within that time. It is an indication that the application was not received for processing when a license is not issued within 120 days.

[5] Sections 97.511(e) and 97.519(b), 47 C.F.R. §§ 97.511(e) and 97.519(b), regulate the delivery of the applications of successful examinees from the administering VEs to the Commission.

[6] Section 308(a) of the Communications Act, 47 U.S.C. § 308(a), provides that a station license may only be granted upon receipt by the Commission of a written application.

for enacting rules that provide for conditional operation of a private radio station pending final grant of an application. We previously have adopted rules to permit applicants in the Citizens Band Radio Service,[7] the Maritime Services,[8] and the Private Land Mobile Radio Services[9] to engage in temporary operation pending final grant of their applications. In those instances, the Commission found that such a procedure would advance significant public interest objectives.

6. For purposes of over-the-air identification, we propose that stations that are operated by a new control operator exercising temporary operating authority shall use a temporary call sign determined by the person's initials and mailing address. The prefix for each such call sign would be WZ. This unique prefix would identify the station as a new amateur station awaiting a license. The prefix would be followed by the number corresponding to the VEC Region for the mailing address shown on the license application.[10] The person's initials and an indicator denoting the license class would follow the VEC Region number.[11] We believe this system would be useful to the amateur community, yet practical to implement.

7. In accordance with the foregoing discussion, we propose to amend the amateur service rules to extend temporary operating authority to persons who pass the examinations for a new amateur operator license. Comments are invited on this proposal.

## IV. PROCEDURAL MATTERS

**Ex Parte Rules -- Non-Restricted Proceeding**

8. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

**Regulatory Flexibility Act**

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur stations that are the subject of this proceeding would not be authorized to transmit any communications where the station licensee or control operator has a pecuniary interest. *See* 47 C.F.R. § 97.113(a)(3). The Secretary shall send a copy of this *Notice*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1980).

**Comment Dates**

10. Authority for issuance of this *Notice* is contained in Sections 4(i), 303(r), 307(a), and 308(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 307(a), and 308(a). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 10, 1994**, and reply comments on or before **February 10, 1994**. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

11. For further information, call Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

**Part 97 - Amateur Radio Service**

1. The authority citation for Part 97 continues to read as follows:

**Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.**

2. In Section 97.5, paragraphs (a), (b), and (c) are revised to read as follows and a new paragraph (d)(7) is added to read as follows:

**§ 97.5 Station license required.**

(a) When a station is transmitting on any amateur service frequency from a geographic location within 50 km of the Earth's surface where the amateur service is regulated by

---

[7] 41 Fed. Reg. 15849 (1976).
[8] 70 FCC 2d 863 (1979).
[9] Conditional Authorization Procedure for Proposed Private Land Mobile Radio Service Stations, 4 FCC Rcd 8280, 8283 (1989).
[10] The VEC regions are listed in Appendix 2 of Part 97, 47 C.F.R. Part 97, Appendix 2.
[11] For example, applicant John Doe, who passed an examination for a General Class operator license, living in Quincy, Illinois, would use the temporary call sign WZ9JZD/AG. *See* Appendix, § 97.119 (e) and (g).

the FCC, the person having physical control of the apparatus must have a written authorization recognized by the FCC for an amateur station.

(b) When a station is transmitting on any amateur service frequency from a location within 50 km of the Earth's surface and aboard any vessel or craft that is documented or registered in the United States, the person having physical control of the apparatus must have a written authorization recognized by the FCC for an amateur station.

(c) When a station is transmitting on any amateur-satellite service frequency from a location more than 50 km above the Earth's surface aboard any craft that is documented or registered in the United States, the person having physical control of the apparatus must have a written authorization recognized by the FCC for an amateur station.

(d) * * *

(7) A CSCE indicating that the person has passed the necessary examinations for a new amateur operator license within the previous 120 days, *provided that:*

(i) The person has properly filed with the administering VEs an application, received on behalf of the FCC, for a new operator/primary station license that the FCC has not yet acted upon;

(ii) The person is not a prior amateur service licensee whose license was revoked, suspended for less than the balance of the license term and the suspension is still in effect, suspended for the balance of the license term and relicensing has not taken place, or surrendered for cancellation following notice of revocation, suspension, or monetary forfeiture proceedings;

(iii) The person is not the subject of a cease and desist order that relates to amateur service operation and which is still in effect;

(iv) The temporary authority ceases immediately, if the application is returned without action;

(v) No temporary authority is authorized if the operation of the station may have a significant environmental effect, as defined by § 1.1307 of this chapter; and

(vi) The temporary authority is accepted with the express understanding that such authority may be modified or cancelled at any time without hearing if, in the FCC's discretion, the need for such action arises.

* * * * *

3. Section 97.7 is amended by adding a new paragraph (d) to read as follows:

**§ 97.7 Control operator required.**

* * * * *

(d) A CSCE indicating that the person has passed the necessary examinations for a new amateur operator license within the previous 120 days, *provided that:*

(1) The person has properly filed with the administering VEs an application, received on behalf of the FCC, for a new operator/primary station license that the FCC has not yet acted upon;

(2) The person is not a prior amateur service licensee whose license was revoked, suspended for less than the balance of the license term and the suspension is still in effect, suspended for the balance of the license term and relicensing has not taken place, or surrendered for cancellation following notice of revocation, suspension, or monetary forfeiture proceedings;

(3) The person is not the subject of a cease and desist order that relates to amateur service operation and which is still in effect;

(4) The temporary authority ceases immediately, if the application is returned without action; and

(5) No temporary authority is authorized if the operation of the station may have a significant environmental effect, as defined in § 1.1307 of this chapter; and

(6) The temporary authority is accepted with the express understanding that such authority may be modified or cancelled at any time without hearing if, in the FCC's discretion, the need for such action arises.

4. Section 97.9 is amended by adding a new paragraph (c) to read as follows:

**§ 97.9 Operator license.**

* * * * *

(c) A person not holding a valid amateur operator license who has properly filed with the administering VEs an application, received on behalf of the FCC, for a new operator/primary station license that the FCC has not yet acted upon, and who holds a CSCE indicating that the person has passed the necessary examinations within the previous 120 days, is authorized the frequency privileges specified in § 97.301 for the operator class for which application was made, *provided that:*

(1) The person is not a prior amateur service licensee whose license was revoked, suspended for less than the balance of the license term and the suspension is still in effect, suspended for the balance of the license term and relicensing has not taken place, or surrendered for cancellation following notice of revocation, suspension, or monetary forfeiture proceedings;

(2) The person is not the subject of a cease and desist order that relates to amateur service operation and which is still in effect;

(3) The temporary authority ceases immediately, if the application is returned without action; and

(4) No temporary authority is authorized if the operation of the station may have a significant environmental effect, as defined in § 1.1307 of this chapter; and

(5) The temporary authority is accepted with the express understanding that such authority may be modified or cancelled at any time without hearing if, in the FCC's discretion, the need for such action arises.

5. Section 97.119 is amended by revising paragraph (e) and adding a new paragraph (g) to read as follows:

**§ 97.119 Station identification.**

* * * * *

(e) When the control operator is a person who is exercising the rights and privileges authorized by § 97.9 (b) or (c), an indicator must be included after the call sign as follows:

(1) For a control operator who has requested a new Novice Class license: No indicator;

(2) For a control operator who has requested a new Technician Class license or a license modification from Novice Class operator to Technician Class: KT;

(3) For a control operator who has requested a new General Class license or a license modification from Novice Class or Technician Class operator to General Class: AG;

(4) For a control operator who has requested a new Advanced Class license or a license modification from Novice, Technician, or General Class operator to Advanced Class: AA; or

(5) For a control operator who has requested a new Amateur Extra Class license or a license modification from Novice, Technician, General, or Advanced Class operator to Amateur Extra Class: AE.

* * * * *

(g) When the station is transmitting under the authority of § 97.5(d)(7), the call sign must consist of the following in sequential order:

(1) The prefix WZ;

(2) The numeral for the VEC Region for the mailing address given in the license application filed by the person;

(3) The initial of the person's first name;

(4) The initial of the person's first middle name, or the letter Z, if the person has no middle name;

(5) The initial of the person's last name; and

(6) The indicator required by paragraph (e) of this section.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-89**

In re Applications of

AURIO A. MATOS File No. BPH-911114MS

LLOYD SANTIAGO-SANTOS AND LOURDES RODRIGUEZ BONET File No. BPH-911115MP

For Construction Permit for a New FM Station on Channel 293A in Culebra, Puerto Rico

**Appearances**

*Scott Cinnamon* and *Stephen Diaz Gavin* on behalf of Aurio A. Matos, *David Hill* and *Audrey Rasmussen* on behalf of Lloyd Santiago-Santos and Lourdes Rodriguez Bonet, *Gary P. Schonman* on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ**

**Issued: October 25, 1993; Released: November 4, 1993**

1. This proceeding involves the mutually exclusive applications of Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez Bonet (Santos and Bonet) for a construction permit for a new radio station on channel 293A in Culebra, Puerto Rico. The matter was designated for hearing pursuant to an *Order* of the Commission, DA 93-331, released on April 8, 1993, and assigned to the Undersigned by *Order* FCC 93M-160, released on April 13, 1993.

2. The *Hearing Designation Order* (HDO) setting this matter for hearing specified the following Issues:

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applicants should be granted, if any.

3. The Commission, in the aforementioned *HDO*, noted that there was a significant difference in the size of the areas and populations to be served by the two proposals. Accordingly, it further specified that the areas and populations that would receive FM service of 1 mVm or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue.

4. Procedural dates were specified by *Order*, FCC 93M-166, released on April 15, 1993, issued prior to the date of the prehearing conference held in the matter on June 9, 1993. Direct case exhibits were exchanged prior to the Admissions Session held on August 18, 1993, and were received on that date. After hearing argument advanced in favor of permitting the cross-examination of certain sponsoring witnesses, the Presiding Judge concluded that no need had been shown for cross-examining anyone of the sponsoring witnesses. He concluded, therefore, that a decision on the designated issues would be reached based on the direct case exhibits and the argument contained in the Proposed Findings of Fact and Conclusions of Law and the replies thereto. The record was closed, but then reopened for the sole purpose of receiving the joint engineering exhibit addressing the so-called "areas and populations" issue. See *Order* 93M-544, released August 25, 1993.

5. Proposed Findings of Fact and Conclusions of Law were filed by both Applicants and the Mass Media Bureau. Mr. Matos filed a reply to the Proposed Findings submitted by Santos and Bonet. The matter now stands ripe for the issuance of an initial decision.

**FINDINGS OF FACT**

**Aurio A. Matos**

6. Mr. Matos is an individual applicant who proposes to serve as General Manager at his proposed station in Culebra, Puerto Rico. He has indicated that he will devote a minimum of forty hours a week to his duties at the station. As General Manager, he will direct the overall operation of the station, establishing and implementing the station's policies and practices. He will also supervise and have responsibility for the station's compliance with all applicable Federal Communications Commission (F.C.C.) rules, and he will also be charged with hiring and firing, if necessary, of the station's personnel (Matos Exhibit 1). The Matos proposal calls for the installation of an auxiliary power source so that a broadcast service can continue to be provided in the event of a power failure (Matos Exhibit 2).

7. Mr. Matos is an Hispanic male who has lived his entire life in Puerto Rico. For approximately the past three years, Mr. Matos has been a resident of Mayaguez, Puerto Rico. Prior to moving to Mayaguez, he was a life long resident of Bajaguez, Aguada, Puerto Rico. In the event that he is the successful applicant, Mr. Matos has pledged to move to Culebra, Puerto Rico (Matos Exhibit 1).

8. Mr. Matos is presently employed as the Station Manager of WCXQ(AM), Moca, Puerto Rico. His previous broadcast experience consists of the following:

1980-1989 - General Manager, WRFE-FM, Mayaguez City, Puerto Rico;

1989-July 31, 1992 - General Manager and President, as well as a director of the licensee of non-commercial educational FM station WJDZ (now WKVN), Levittown, Puerto Rico.

Mr. Matos has pledged that he will terminate his present employment and any other employment he might undertake in order to meet his commitment to the Culebra facility (Matos Exhibit 1).

9. Mr. Matos has no existing media interests (Matos Exhibit 1).

**Santos and Bonet**

10. Lloyd Santiago-Santos and Lourdes Rodriguez Bonet are husband and wife, and they filed their application for the Culebra broadcast facility as a general partnership with each person having a 50 percent interest in the venture, and an equal share of the overall responsibility for the project (Santos and Bonet Exhibit 1).

**Lloyd Santiago-Santos**

11. Mr. Santiago-Santos proposes to serve as the station's Sales Manager. He will also be responsible for the development of its advertising policies, and advertising rates, as well as the supervision of its sales personnel. Mr. Santiago-Santos proposes to devote a minimum of forty hours a week to his duties at the station (Santos and Bonet Exhibit 2).

12. Mr. Santiago-Santos, an Hispanic male, was born in Puerto Rico, where he has lived his entire life. He proposes to move to Culebra, Puerto Rico in the event that his application is granted (Santos and Bonet Exhibit 2). From 1981 until 1982, Mr. Lloyd Santiago-Santos worked as a sales person at radio station WQIL, San Juan, Puerto Rico, and from 1982 until 1991, as General Manager for station WMSW-AM, Hatillo, Puerto Rico (Santos and Bonet Exhibit 2).

**Lourdes Rodriguez Bonet**

13. Ms. Bonet, an Hispanic female, will serve as the station's General Manager. As General Manager, she will be responsible for the day-to-day operations of the station, as well as the supervision of the station's personnel. She will also act as principal liaison between the Culebra station and the community, and in such a role, she will oversee the continuing ascertainment of community needs and the formulation of programming designed to meet those needs. Ms. Bonet proposes to devote a minimum of forty hours a week to her duties at the station, and she has indicated that she intends to move to Culebra, Puerto Rico in the event that her application is granted (Santos and Bonet Exhibit 1).

14. Ms. Bonet worked as an accountant in the accounting/business office of radio station WQBS, San Juan, Puerto Rico, from 1980 to 1981. Her duties involved preparing invoices which required an examination of the station's logs for spot runs and the coordination of sales commissions with the sales department. Ms. Bonet testified that her duties at WQBS involved her in all aspects of the station's financial operations (Santos and Bonet Exhibit 1).

15. Other than a thirty-three and one-third ownership interest in Santiago Communications, Inc., a publisher of a monthly medical newspaper in the northern part of Puerto Rico from Vega Alta to Isabela, Ms. Bonet has no other interests in any other form of mass communications. In the event that the Santos and Bonet application is granted, Ms. Bonet will divest herself of her interest in Santiago Communications, Inc. As to Mr. Santiago-Santos, he too holds a thirty-three and one-third interest in Santiago Communications, Inc. He also owns fifty percent of a corporation that publishes *El Periodico del Norte,* a weekly newspaper published in Arecibo, Puerto Rico, and distributed free to communities on the northern part of the island. Mr. Santiago-Santos is committed to divest himself of these interests in the event that the Santos and Bonet application is granted (Santos and Bonet Exhibits 1 and 2).

16. The Santos and Bonet proposal calls for the installation of an auxiliary power source at the proposed station's transmitter site in order to ensure continued operations in the event of a power failure (Santos and Bonet Exhibit 1).

**Comparative Coverage**

17. Mr. Matos proposes to serve, in its 60 dBu contour, a population of 69,092 people in an area of 440 square kilometers. The Santos and Bonet application proposes to serve, in its 60 dBu contour, 1,542 persons in a 44 square kilometer area. The parties have stipulated that all of the areas and populations proposed to be served by the two applicants are already served by five or more aural services (Joint Exhibit 1).

## CONCLUSIONS OF LAW

18. Neither applicant is subject to a diversification demerit. In addition, both Applicants propose to install an auxiliary power source to ensure continued operations in the event of a power failure. Furthermore, all principals are members of a recognized minority group, and neither Applicant sought a comparative credit for local residence or civic involvement. Both Applicants propose a 100 percent integration of ownership into management at their respective stations, and all principals of both Applicants are committed to move to the city of license in the event of a grant of their application. The only disparities between the two applicants relate to the past broadcast experience of the principals and the areas and populations to be served by the two proposals. Otherwise, both Applicants are on an equal footing from a comparative standpoint.

19. Mr. Matos is entitled to a slight comparative preference over the Santos and Bonet application on the basis of his proposal to serve forty-five times the number of persons and ten times the area. His application also demonstrates a superior past broadcast experience which entitles his application to a further, very slight preference. Although the comparative advantage that Mr. Matos holds over his rival is slight, it is nevertheless decisive in this case, and entitles his application to a comparative preference over that of Santos and Bonet, warranting a grant of his application. It will be so ordered.

## RULING

20. IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's rules, 47 C.F.R. 1.276, the application of Aurio A. Matos (File No. BPH-911114MS) for a construction permit for a new FM station on Channel 293A in Culebra, Puerto Rico IS GRANTED, subject to the outcome of MM Docket No. 91-259; and that the application of Lloyd Santiago-Santos and Lourdes Rodriguez Bonet (File No. BPH-911115MP) IS DENIED.[1]

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

Section 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-306**

In re Applications of

| | |
|---|---|
| HENRY R. MALLOY, JR. d/b/a REM MALLOY BROADCASTING | File No. BPH-860627MH |
| PEEBLES BROADCASTING COMPANY | File No. BPH-860603ME |
| JAMES S. LEE and DONALD L. BAKER d/b/a INTERACTIVE MEDIA | File No. BPH-860707MS |
| FREE AIR CORPORATION | File No. BPH-860707NH |
| BERNARD DAWSON | File No. BPH-860707NW |
| SPECIAL MARKETS MEDIA, INC. | File No. BPH-860703MH |

For Construction Permit for
New FM Station on Channel 275A,
Raleigh, North Carolina

**ORDER**

**Adopted: October 28, 1993; Released: November 5, 1993**

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. Before the Review Board are the *Initial Decision*, 4 FCC Rcd 8423 (1989) (*I.D.*), *Supplemental Initial Decision*, 6 FCC Rcd 2247 (1991) (*S.I.D*), and *Further Supplemental Initial Decision*, 7 FCC Rcd 8024 (1992) (*F.S.I.D.*), of Administrative Law Judge Joseph Chachkin. ALJ Chachkin concluded the hearing phase of this proceeding by granting the application of Bernard Dawson for a construction permit for a new Class A FM station in Raleigh, North Carolina, and denying the competing applications of the other parties. In doing so, he found that Peebles, Interactive, and Special Markets are not qualified and that Special Markets would not be entitled to more than twenty-five percent integration credit, even if qualified. Exceptions to these rulings are pending before the Board.

2. Various exceptors have argued that the ALJ erred in finding Dawson to be financially qualified. If these exceptions were granted and the ALJ's conclusions regarding Peebles, Interactive, and Special Markets affirmed, attention would next focus on Malloy who ranks behind these applicants comparatively. However, Free Air has alleged that the ALJ erred in failing to designate a financial issue against Malloy regarding the availability of reasonable assurance of a bank loan for part of his financing. Because we are unable to resolve this question on the basis of the present record, we shall direct Malloy to supplement the record as indicated below.

3. To be financially qualified an applicant must have reasonable assurance of committed funds from a lender or lenders sufficient to cover the applicant's construction and initial operating costs. If the lender has a present firm intention to make a loan, future conditions permitting, the reasonable assurance standard is satisfied. *See Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 ¶ 2 (1980). The Commission generally evaluates reasonable assurance for applicants relying on bank loans by considering "whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower." *Liberty Productions*, 7 FCC Rcd 7581, 7584 ¶ 23 (1992), citing *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161 ¶ 13 (Rev. Bd. 1990); *see also Scioto* at 5160 ¶ 12, *cited with approval in Isis Broadcasting Group*, FCC 93-441, slip op. at 1 n. 3 (released Sept. 24, 1993). This appertains whether the bank loan is for the whole project or merely intended to supplement the primary financing.

4. Rem Malloy, an individual applicant, certified to his financial qualifications when he filed his application. He later amended the engineering portion of his application at the Commission's direction[1] to specify a new site requiring a more expensive engineering proposal. Malloy acknowledged in deposition testimony that the costs resulting from this amendment exceeded the financial commitment he had received from his father, a retired physician, to finance the station as initially proposed, but he claimed that he had timely received reasonable assurance of a supplemental bank loan to cover the difference. Malloy dep. tr. 40, App. A to Malloy Opposition to Petition to Enlarge, Dec. 14, 1988 (Malloy Opposition).[2] His deposition continued at tr. 83:

> Q There came a time when you obtained a bank letter in August of 1988.
>
> At that time did you personally prepare and submit any balance sheets as to your financial situation to the bank?
>
> A (Malloy) No.

[1] *HDO*, 3 FCC Rcd at 4376 ¶ 8. The application was short-spaced because of a site restriction to an allotment for Kinston, North Carolina, that had not been published.

[2] All deposition transcript pages cited herein are found in Malloy Opposition to Petition to Enlarge, App. A, Dec. 14, 1988.

Although brief, Malloy's response raises the very real possibility that the bank did not have sufficient information about Malloy for an informed assurance of financing upon which Malloy is dependent. *See Scioto*, 5 FCC Rcd at 5160 ¶ 12 (the data provided to satisfy a bank would normally include "the borrower's assets, credit history, current business plan, and similar data"). If the bank did lack sufficient information for informed decision-making, the letter would be nothing more than an accommodation, falling far short of the reasonable assurance needed to maintain Malloy's financial qualifications. *See Isis Broadcast Group*, 7 FCC Rcd 5125, 5126 ¶ 7, 5128 n.13, 5129 ¶ 16 (Rev. Bd. 1992), *aff'd*, FCC 93-441, slip op. at 1 n. 3 (released Sept. 24, 1993) (applicants not financially qualified where banks lacked sufficient information to form a present intention to make a loan, future conditions permitting). We have considered whether Malloy's opposition pleading below or its replies to exceptions here dispel the doubt raised in the deposition testimony, but neither pleading explains or elaborates on the testimony. To rebut Free Air's allegation, Malloy simply refers to the bank letter itself, which it describes only as "detailed and consistent with Commission requirements on its face" and not Malloy's primary source of funds. 1991 Brief at 4. A copy was attached in redacted form to both the Free Air and the Malloy pleadings below. The letter recites the bank's willingness to lend Malloy money, but it does not advise that the bank has reviewed or is familiar with Malloy's qualifications.[3] It also does not appear to include any consideration of collateral, another element critical to an informed meeting of the minds between borrower and lender. *See* Letter from Mary Webb, Vice President, NCNB National Bank to Malloy of 8/23/88 included in Free Air Petition to Enlarge Issues Against Rem Malloy, Exh. 1, Dec. 1, 1988, and Malloy Opposition, App. C. In light of Malloy's testimony that he provided no financial statement, we cannot assume that the omission of collateral from the letter is a mere technical deficiency. *Compare Coast TV*, 7 FCC Rcd 6244, 6245 ¶ 5 (Rev. Bd. 1992) (remanded on financial issue because of woeful deficiencies in bank letter); *with Sumter Radio Partners*, 7 FCC Rcd 2573, 2576 ¶ 14 (Rev. Bd.) (bank letter's omission of specific collateral and cash flow terms did not require further hearing where bank official stated in sworn declaration that he had closely reviewed applicant's collateral, business plan, and other information and found them satisfactory), *rev. denied*, 7 FCC Rcd 5977 (1992); *A.P. Walter, Jr.*, 6 FCC Rcd 875, 877 ¶ 13 (Rev. Bd. 1991) (failure to discuss collateral in bank letter not significant in light of bank's review of financial statement showing adequate net worth).

5. It is not clear from the record whether the banker had sufficiently detailed financial information concerning Malloy to make an informed decision about a loan. *See Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990) (remanded on financial issue because, *inter alia*, bank had not seen necessary financial data); *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987) (financial issue designated where individual qualifications of applicants were not considered by banks issuing purported reasonable assurance letters). Thus, it is not clear whether the bank's letter satisfies the *Liberty/Scioto* standard for demonstrating reasonable assurance. Where ambiguities or gaps in the record may be relieved by supplementation, the Commission and the Board have routinely sought supplemental information. *See, e.g., Capitol City Broadcasting Co.*, FCC 93I-034 (released July 6, 1993); *Edwin A. Bernstein*, 6 FCC Rcd 2875 (Rev. Bd. 1991); *A.P. Walter, Jr.*, 5 FCC Rcd 5586 (Rev. Bd. 1990); *Global Information Technologies, Inc.*, 5 FCC Rcd 535 (Rev. Bd. 1990).

6. Malloy is directed to supplement the record with a copy of the unredacted August 23, 1988 letter from NCNB National Bank and a showing verified by the bank of: (1) the information/documentation provided to the bank upon which the bank's purported willingness to lend money was based; and (2) any understandings reached between the bank and Malloy in connection with that letter as to the terms of any loan, including any collateral or guarantee requirements.[4]

7. ACCORDINGLY, IT IS ORDERED That Henry R. Malloy, Jr. d/b/a Rem Malloy Broadcasting SHALL FILE the documents called for in paragraph 6 within twenty (20) days of the release date of this Order; and

8. IT IS FURTHER ORDERED That the competing applicants herein MAY FILE responsive comments within ten (10) days of the date of the filing of the supplement.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[3] The requirement that the bank be informed about the borrower's financial position may also be satisfied if the bank has a long and established relationship with the borrower from which one can infer thorough familiarity with the borrower's assets, credit history, current business plan, and other relevant data. *See Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); *Scioto* at ¶ 12. No such relationship has been suggested here.

[4] In *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989), the Commission held that, if called upon to provide evidence of reasonable assurance of financing, an applicant can reconstruct the documentation relied upon to claim reasonable assurance. Upon judicial review, the Court of Appeals refused to accept that proposition without further agency explanation. *Northampton Media Associates v. FCC*, 941 F.2d 1214 (D.C. Cir. 1991). *Accord Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220, 1230 (D.C. Cir. 1993). However, the Commission recently stated its allegiance to its *Northampton* position. *See Emision De Radio Balmaseda, Inc.*, 8 FCC Rcd 4335 (1993). This subordinate Board is bound by the Commission's decision in *Emision*. *See Mableton Broadcasting Co., Inc.*, FCC 93R-53, slip op. at 17 n. 32 (Rev. Bd. released Oct. 22, 1993).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Nucla-Naturita Telephone Company

Acquisition of Lines from
US West Communications, Inc.

**ORDER**

**Adopted: October 28, 1993; Released: November 4, 1993**

By the Chief, Tariff Division, Common Carrier Bureau:

1. By letter dated August 13, 1993, the Nucla-Naturita Telephone Company, Inc. (Nucla-Naturita) informed the Commission of its agreement with US West Communications, Inc. (US West) to transfer five access lines of US West's Gunnison exchange to Nucla-Naturita. Nucla-Naturita currently serves approximately 1,100 subscribers. Nucla-Naturita requests study area and price cap waivers if necessary to consumate this transaction. Nucla-Naturita states that filing fees and attorney's fees associated with formal waiver requests would be a substantial burden.[1] In this Order we grant Nucla-Naturita waiver of Sections 61.41(c) and (d) of the Commissions Rules which will (1) allow the acquired five access lines to be regulated under rate of return principles instead of price cap principles; and (2) allow Nucla-Naturita to avoid the application of price cap regulation to its interstate services.[2]

2. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must file tariffs pursuant to price cap regulation within a year of the transaction.[3] In the absence of the rule a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) while generating greater earnings for the price cap affiliate without triggering the sharing mechanism.[4] Also, if a LEC were allowed to alternate between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps which rewards carriers for making efficiency gains.[5] The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of gaming the system. Such cases might justify a narrow waiver of the all-or-nothing rule."[6]

3. We conclude that this is the type of transaction, involving the purchase of a small number of access lines, the Commission anticipated granting narrow waivers. The first concern identified by the Commission in adopting these rules -- cost-shifting between affiliates -- is not at issue here. Nucla-Naturita is not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rules -- allowing a company to use mergers and acquisitions as a means of "gaming the system" -- is also not raised in this case. US West will remain regulated under price caps; it retains no ownership over the five access lines that would permit it to convert the property back into price cap exchanges. In addition, Nucla-Naturita asserts that it cannot assume the risks or regulatory burdens of price cap regulation.[7]

4. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[8] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed largely on the basis of historical performance by the largest local exchange carriers.[9] The Commission therefore made price cap regulation optional for smaller carriers. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Operating Companies, our application of the all-or-nothing rule must take into account the Commission's concerns about applying the price cap system to small carriers.

5. We therefore conclude that there is good cause to grant Nucla-Naturita a waiver of Section 61.41 (c) and (d), which allows the property purchased by Nucla-Naturita to become subject to rate of return regulation. This action is consistent with *Golden West Telecommunications Cooperative, Inc.*, 8 FCC Rcd 6325 (Com. Car. Bur. 1992). Because Nucla-Naturita does not serve more than 50,000 access lines, it does not require a waiver of Section 69.3 to re-enter the NECA pools.[10]

6. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 4(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the Nucla-

---

[1] Nucla-Naturita Letter at 1.

[2] The Accounting and Audits Division determined that a waiver of the definition of "study area" contained in Part 36, Appendix-Glossary of the Commission's Rules is not required.

[3] Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. § 61.42(c)(2). Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786, 6821 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order*), *appeals of LEC Price Cap Order affirmed sub nom., National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

[4] *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

[5] *Id.*

[6] *Id.* at n.207.

[7] Nucla-Naturita Letter at 1.

[8] *See, e.g.*, Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993), *petitions for recon. pending*; and Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

[9] *LEC Price Cap Order*, 5 FCC Rcd at 6818.

[10] *See* 47 C.F.R. § 69.3(g)(2).

Naturita Telephone Company, Inc. IS GRANTED waiver of Sections 61.41(c) and (d) of the Commission's Rules, 47 C.F.R. § 61.41(c) and (d).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

C.F. Communications Corporation,
Complainant,

v.

| | |
|---|---|
| Century Telephone of | File Nos. |
| Wisconsin, Inc., | E-89-170 |
| GTE North, Incorporated, | E-89-171 |
| Wisconsin Bell, Inc., | E-89-172 |
| North-West Telephone Company, | E-89-180 |
| Turtle Lake Telephone Company, | E-89-181 |
| Utelco, Inc. | E-89-182 |
| Defendants. | |

**ERRATA**

**Released: November 5, 1993**

1. The *Memorandum Opinion and Order* (*MO&O*) in the above-captioned proceedings (DA 93-1215), released October 14, 1993, is corrected by the insertion in its caption of the following party defendant and file number inadvertently omitted from the *MO&O:*

The Mosinee Telephone Company File No. E-89-179

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 92-316**

In re Application of

RIVERTOWN COMMUNICATIONS COMPANY, INC. — File No. BPH-911008ME

SAMPLE BROADCASTING COMPANY, L.P. — File No. BPH-911010MA

For Construction Permit for a New FM Station on Channel 282C3 in Eldon, Iowa

**Appearances**

*Donald E. Ward, Esq.* on behalf of Rivertown Communications Company, Inc.; *John S. Neely, Esq.* and *Jerrold Miller, Esq.* on behalf of Sample Broadcasting Company, L.P; and *Norman Goldstein, Esq.* on behalf of the Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK**

**Issued: November 2, 1993; Released: November 10, 1993**

**PRELIMINARY STATEMENT**

1. The mutually exclusive applications of Rivertown Communications Company, Inc. ("Rivertown") and Sample Broadcasting Company, L.P. ("Sample"), each seeking a construction permit for a new commercial FM broadcast station at Eldon, Iowa, were designated for hearing by *Hearing Designation Order* (DA 92-1754) released January 21, 1993, under the standard comparative issues. By *Memorandum Opinion and Order* of the Presiding Judge released March 26, 1993 (93M-124), issues were added as follows:

(1) To determine whether the application of Sample Broadcasting was filed for the purpose, in whole or in part, of delaying action upon and grant of the application of Rivertown Communications Company, Inc.;

(2) To determine whether O-Town Communications, Inc., and/or any of its officers, directors, and stockholders, is a real party-in-interest to the application of Sample Broadcasting;

(3) To determine the extent of the involvement of Bruce Linder in the planning and development of the application of Sample Broadcasting;

(4) To determine the programming intentions of Sample Broadcasting, with particular reference to potential duplication of the programming of Station KKSI-FM;

(5) To determine, in light of the evidence adduced under the foregoing issues, whether the application of Sample Broadcasting affirmatively misrepresents material facts, or knowingly conceals material facts; and

(6) To determine, in light of the evidence adduced under the foregoing issues, whether Sample Broadcasting possesses the basic qualifications to be a Commission licensee.

2. A prehearing conference was held March 22, 1993. An admissions hearing session was held May 25, 1993. Hearing sessions were held June 22-23, 1993, on all issues. The record was closed June 23, 1993.

**FINDINGS OF FACT**

**Rivertown Communications Company, Inc.**

3. Rivertown is an Iowa Corporation, formed on August 21, 1991. It has a single class of stock -- common voting -- of which the owners are:

| | | |
|---|---|---|
| David W. Brown | 55 shares | 55% |
| Ellen M. Bowen | 45 shares | 45% |

David W. Brown ("Brown") is the president and a director of the corporation; Ms. Bowen is the secretary, treasurer, vice president, and a director (Rivertown Ex. 1).

4. Neither Rivertown nor either of its stockholder has any interest in any medium of mass communications.

5. Rivertown claims a preference in the nature of a "pioneer's preference" for having found and successfully proposed the allocation of Channel 282C3 to Eldon in January 1991; by its Report and Order released July 26, 1991 (6 FCC Rcd 4516), the Commission made the allocation at Rivertown's request (Rivertown Ex. 1, Att. A).

6. Brown will be a full-time general manager of the proposed station, and will devote a minimum of 40 hours per week to the station's management, and will oversee every aspect of station operations. He will resign his current position as manager of Station KKMI-FM, Burlington, Iowa, following the grant of Rivertown's application and prior to the commencement of operations of the Eldon station (Rivertown Ex. 2).

7. Brown was born in Ottumwa, Iowa, (within the proposed service area) on August 13, 1961, and lived on his family's farm approximately eight miles southwest of Eldon from birth until after his graduation from high school in Bloomfield, Iowa (also within the proposed service area) in 1979 (*Id.*).

8. Following graduation from high school, Brown moved to Ottumwa where he lived until September 1983, when he moved to Knoxville, Iowa. He returned to the family farm in December 1984, and moved back to Ottumwa in May 1985, remaining until July 1986. After a brief period in Fort Dodge, Iowa, he returned to Ottumwa in April 1987, and in September 1987 he moved to Fairfield, Iowa (also in the proposed service area) where he lived until July 1989, when he returned to the family farm just south of Eldon, remaining there until December 1990 (*Id.*).

9. Brown (together with Ms. Bowen's husband) purchased a residence in Eldon in October 1991, where he lived briefly in the Spring of 1992, before moving to Illinois to manage stations in Galesburg. He spends most weekends and occasional holidays there, and would make it his full-time residence following grant of Rivertown's application (*Id.*).

10. Brown's civic activities in the community and service area are listed as follows:

- Membership on the Wapello County Cancer Society Board, 1982-1983.

- Recipient, in 1982, of the Silver Award from the Wapello County United Way for "Outstanding Service to the People of Our Community."

- Member of the Board of Care and Share, an Ottumwa non-profit organization, 1982-1983.

- Promotion of fund-raising activities for new uniforms for the Ottumwa High School Band, 1982.

- Served as Chairperson to the Great Western Expedition, a community kids challenge project (Ottumwa), 1982.

- Member of the Fairfield/Jefferson County Isaac Walton League, 1988-1989.

- Member of the Fairfield JayCees, 1989.

(*Id.*).

11. Brown's broadcast experience dates from his high school days, when he was employed as a part-time staff announcer at Stations KLEE(AM) and -FM, Ottumwa, Iowa, from August 1977 to October 1979. He became a full-time employee after his graduation in May 1979. He was employed by KBIZ(AM) in Ottumwa from December 1979 to January 1983, first as a staff announcer and later as public service director. He returned to KLEE (AM)/KLEE-FM in January 1983 as staff announcer and salesman, leaving in September 1983 to take a similar position with KNIA(AM), Knoxville, Iowa, where he remained until November 1984. He was employed as sales manager/staff announcer at KLBA(AM) Albia, Iowa, from November 1984 to March 1985, when he was hired by Stations KXJX/KFMD at Pella/Des Moines as staff announcer and salesman and later operations manager, remaining there through July 1986, when he moved to KRIT-FM, Clarion/Ft. Dodge, Iowa, as staff announcer, operations and program director, and interim manager until March 1987 (*Id.*).

12. In June 1987, Brown was employed by KMCD(AM) and KMCD-FM, Fairfield, Iowa, as operations and program director, and later general manager, remaining until July 1989. He was program director and staff announcer at KXOF-FM, Bloomfield, from February 1990 to September 1990. From January 1991 to August 1991, he was public affairs director and staff announcer at KBKB(AM) and -FM, Fort Madison, Iowa, resigning to become general manager of KKMI(FM), Burlington, Iowa, where he was employed from August 1991 to March 1992, and from September 1992 to the present. From May 1992 to September 1992, he was general manager of Stations WAIK(AM) and WGBQ-FM, Galesburg, Illinois (*Id.*).

13. Ellen Bowen is a 45% stockholder of Rivertown, and its vice president, secretary, treasurer and a director. She will be the full-time business manager of the station and will devote a minimum of 40 hours per week to those duties. Her principal responsibilities will include overseeing billing, collections, and accounts payable, and coordinating sales and traffic. She will resign her current employment with Excel Corporation in Ottumwa (or any other position which she may hold at the time) following grant of Rivertown's application and prior to its commencement of operation, in order to perform her duties as Rivertown's business manager (Rivertown Ex. 3).

14. Ms. Bowen's broadcast experience consists of employment at Stations KMCD(AM) and KIIK(FM), Fairfield, Iowa, from July 1986 to July 1989 in various capacities, including bookkeeper, receptionist, invoicing clerk, office manager, traffic manager, and network coordinator (*Id.*).

15. Ms. Bowen has been a resident of Fairfield, Iowa (within the proposed service area) since 1979, and her civic activities include membership in the First Assembly of God, Fairfield, Iowa (*Id.*).

**Sample Broadcasting Company, L.P.**

16. Sample is a limited partnership comprised of Carmela Sample-Day ("Ms. Sample-Day") as its sole general partner (40% equity) and Bruce Linder ("Linder") as its sole limited partner (60%) (Sample Ex. 4).

17. Sample holds no ownership or control of any medium of mass communications (Sample Ex. 1).

18. Ms. Sample-Day has been until very recently the news director at KKSI(FM), Eddyville, Iowa (since October, 1990). She timely committed to resign that position in Sample's construction permit application, and reaffirmed that commitment at hearing. Linder is the 49% general partner of Rogers Broadcasting Company, permittee of FM station KXAC St. James, Minnesota; a 25% voting shareholder, officer and director of O-Town Communications, Inc., licensee of FM Station KKSI, Eddyville, Iowa. He also holds a 9.53% voting interest in Minnesota Valley Broadcasting Company, licensee of AM Station KTOE, Mankato, Minnesota, and KDOG(FM), North Mankato, Minnesota. Minnesota Valley Broadcasting Company owns 100% of the voting stock of KMHL Broadcasting Company, licensee of KMHL(AM)/KKCK(FM), Marshall, Minnesota, and EARL(FM), Tracy, Minnesota; and owns 49% of the voting stock of Waite Park Broadcasting Company, permittee of a new FM station at Glencoe, Minnesota (Sample Exs. 1, 4).

19. Sample's limited partnership agreement states that its general partner has full and exclusive charge and control of the management, conduct and operation of the partnership in all respects and sole control over the day-to-day operations of the radio station. The agreement provides that the limited partner has investment rights only, and shall not be involved in the management or operation of the partnership's enterprises, act as an employee of the limited partnership, serve in any material capacity as an independent contractor or agent of the partnership, communicate with the general partner on matters pertaining to the day-to-day operations of the partnership business, vote on the removal of the general partner, perform any services and shall take no part in or interfere in any manner with the management, conduct or authority of the partnership business and shall have no right or authority to act for or by the partnership (Sample Ex. 1, pp. 6-7).

20. Ms. Sample-Day will be the general manager of the new Eldon radio station, working a minimum of 40 hours per week (full-time) there. She will be in charge of all

aspects of the station's operation, including but not limited to, setting all station policies, hiring and firing personnel, verifying all accounting books and assuring compliance with all federal and local laws and regulations. She will supervise all employees and will oversee the entire day-to-day operation of the station. Prior to the Eldon station commencing broadcast operations, she will resign any employment she may have in order to work full-time at the new radio station. She has no other business commitments (Sample Ex. 4).

21. Ms. Sample-Day claims minority enhancement credit as an Hispanic. Her mother and maternal grandparents are full-blooded Hispanics, born in Mexico. She was born and spent the early part of her childhood approximately 30 miles from Eldon, moving to Mexico and becoming a full-time resident there in 1971. She attended I.T.E.S.O. college in Guadalajara, Mexico, and graduated in 1985 with a four-year degree in communications. She speaks fluent Spanish and considers it to be her primary language with English as a second language. She recently accepted an on-call volunteer position assisting with a Spanish/English translation program for the local Iowa court system (Sample Ex. 2, 4; Tr. 110, 111).

22. Ms. Sample-Day worked at KIOA(TV), Ottumwa, Iowa, during the first quarter of 1990, however, she was not listed as an Hispanic employee on the FCC Form 395-B 1990 Annual Employment Report filed by the TV station during that period. Ms. Sample-Day alleges that she told the president and general manager of the KIOA licensee that her mother was Mexican, and she does not know why the station failed to properly report her minority status on the employment report (Rivertown Ex. 16, Tr. 121).

23. Ms. Sample-Day has resided in Ottumwa, Iowa, within Sample's proposed service area (1 mV/m contour), since November 1988. In the event Sample's application for Eldon is granted, Ms. Sample-Day will move her residence to within the Eldon, Iowa, city limits prior to commencing program test authority (Sample Ex. 4).

24. Ms. Sample-Day lists the following civic experience within Sample's proposed service area:

*United Cerebral Palsy Telethon:* volunteer camera work and phone assistance for live television broadcast over station KOIA-TV. Ottumwa, Iowa; Winter 1988 for approximately 12 hours;

*Created and produced drug series for television:* Dealt with the issues of illegal drug sales, drug abuse and the public services available for drug addicts in southern Iowa. Her involvement covered a period of about one week in October 1989 with an average of thirty hours spent directly on the program;

*Created and produced a 30 minute TV show about farmers in southern Iowa:* Dealt with developments in farming techniques, the effect of the competition between big and small operation farmers and the extent to which farmers rely on government subsidies to make a living. Her involvement in the project covered a period of about one week with an average of 25 hours spent directly on the program, October, 1989;

*Created and produced a 30 minute TV show about teenage pregnancy in southern Iowa:* Dealt with the incidence, attitudes, responses and government programs surrounding teenage pregnancy in southern Iowa. Her involvement covered a period of about two weeks with an average of fifty hours per week spent directly on the program. April 1990 and September 1990 through November 1990;

*Grand opening of a new business.* Invited as volunteer host and judge of a pet show. Ottumwa, Iowa; Fairfield, Iowa; May 1990 for a period of about three hours;

*Muscular Dystrophy Association:* Master of Ceremonies for local talent show. Ottumwa, Iowa; September 1990 for a period of about eight hours; and

*Oktoberfest:* Participated in the parade and volunteered in the food tent, Ottumwa, Iowa. This activity was for the benefit of all of Wapello County. September 1990 for a period of one day.

(Sample Exs. 2, 4).

25. Ms. Sample-Day's broadcast experience is as follow:

| | |
|---|---|
| May 1982 - November 1988 | Jorge Corres, Guadalajara, Mexico Translator/Script & Audio Producer for radio and television |
| November 1988 - February 1989 | News/Production Volunteer |
| February 1989 - August 1990 | News Reporter/Anchor KOIA-TV Ottumwa, Iowa |
| October 1990 - Present | KKSI(FM) Eddyville, IA News Director[1] |

(Sample Ex. 4).

26. She was the first news director at KKSI and is responsible for establishing all policy in the news and public affairs programming area, subject to the oversight of the station general manager. She prepares and maintains the station's Quarterly Issues and Programs reports. As a department head, she coordinates with the programming, engineering and sales departments. She hired and supervised a part-time employee in the news department and is responsible for scheduling air-shift replacements for herself when she must be away from the station. As a result of the signal coverage of KKSI, Ms. Sample-Day is responsible for gathering, writing and reporting news events from sixteen counties, which has given her special insight to the needs and interests of the people in Southeastern Iowa (Sample Ex. 2).

27. Sample will install an auxiliary power source at its transmitter site so that the new station may continue to operate in the event of a failure of commercial power (Sample Ex. 4; Tr. 183).

[1] By amendment filed September 17, 1993, Sample reports that Ms. Sample-Day is no longer employed at KKSI. See *Order*, FCC 93M-644, released October 8, 1993.

*Sample's Basic Qualifying Issues - strike application; real party-in-interest; role of passive investor Linder; Sample's programming intentions, and misrepresentation.*

28. As indicated in Finding No. 5, above, Rivertown proposed the allocation of Channel 282C3 to Eldon in January 1991 and by its Report and Order released July 26, 1991, the Commission made the allocation at Rivertown's request.

29. Mark McVey ("McVey") is a 20% voting shareholder, officer, director and chief engineer of O-Town Communications, Inc., licensee of FM Station KKSI Eddyville, Iowa (Sample Ex. 5).

30. McVey first learned of a proposal to allot an FM channel to Eldon in the Spring of 1991 from Ben Evans, a consulting engineer whom he contacted while searching for a possible FM translator frequency for KKSI (Tr. 237).

31. In June 1991, McVey had a conversation with David W. Brown in which they talked generally about how radio stations operate. McVey and Brown have been friends for roughly ten years and have worked together on many projects (Sample Ex. 5). During this conversation, Brown claims that McVey mentioned Brown's pending petition to allot a channel to Eldon, and suggested that Brown consider rebroadcasting KKSI if he were awarded the Eldon permit. Brown responded that it was too early to think about that and asked whether the Linders were aware of the Eldon allotment petition. McVey said that they were. Brown asked if they planned to file an application for Eldon, and McVey responded that he didn't know (Sample Ex. 5, p. 4; Rivertown Ex. 4, ¶ 2). McVey's recollection of this conversation is not good in that it occurred about two years ago (Sample Ex. 5).

32. McVey disallows that it is possible that the potential new FM station at Eldon was mentioned during the 1991 conversation as it was one of Brown's projects. If such were the case, McVey assumes that he likely would have remarked that start-up operations can be very expensive, as he learned from his own experience in building KKSI. In 1991, McVey was familiar with local marketing agreements, known as LMAs, which were beginning to be used by stations as a way of keeping their costs down. McVey believes he suggested to Brown that, in his opinion, it would make sense for any new permittee at Eldon, including Brown, should he receive the construction permit, to consider a programming arrangement with a station such as KKSI. McVey thought that it might make sense for KKSI to consider such an arrangement because it would give the station a broader coverage area. Although an officer of O-Town, McVey emphasizes that any conversations he had with Brown were not in an official corporate capacity. McVey has no authority to make station policy on his own, and was not authorized to speak for KKSI. McVey had not spoken to anyone connected with KKSI about this subject prior to his conversation with Brown in 1991; anything he might have said then was strictly his own brain-storming. In April 1991, William D. Collins ("Collins") was employed by Station KKSI. According to Collins, McVey said at that time "We ought to get Carmela (Sample) to file on that (Eldon) frequency, and then what we ought to do is tie them together so you would have KKSI-FM from here to the Mississippi River." Collins did not understand McVey to be serious (Rivertown Ex. 5, ¶ 1).

33. In June 1991, before the channel was allocated, McVey had no idea who might apply for and become the permittee at Eldon, or what their programming plans might be for the station (Sample Ex. 5, p. 5).

34. After learning of the allotment, McVey thought immediately that the Eldon station could be a good business opportunity for O-Town. McVey believed it would be possible to operate it jointly with KKSI, to achieve economies of scale (Sample Ex. 5, p. 1; Tr. 231, 241, 242, 244).

35. McVey frequently notifies Bruce Linder of filing windows for new channels in hopes that they would be willing to expand the corporation's holdings. For example, he suggested filing opportunities for new FM channels at Arkansas City, Kansas, and at Albia and New Sharon, Iowa. The Albia and New Sharon allotment were made by the Commission in December 1991 for Class C3 facilities within the 1 mV/m contour of KKSI (Tr. 261-162). These suggestions were not pursued by the company, however. These notifications usually occur by phone. McVey speaks with Donald Linder about KKSI business only about five times per year (Sample Ex. 5, p. 1; Tr. 237).

36. McVey knew that the FCC had a policy which prohibited common ownership of FM stations with overlapping city-grade signal contours, and thought that this might be a consideration should O-Town want to pursue the channel. Without discussing the matter with anyone once the Eldon channel was allotted, he called Owl Engineering and commissioned a study to determine whether it would be possible for O-Town to own both stations without violating the city-grade contour overlap prohibition. He first received an area to locate map in early August. This map indicated the area where a transmitter site for the Eldon station might be located to avoid short-spacing to other stations. It did not consider KKSI's contour. About a week later he received a second map showing the area to locate an Eldon site to avoid city-grade overlap with KKSI. This showed a reasonably large area toward the southeast (Rivertown Ex. 6, 7; Tr. 264).

37. After receiving the second map, which verified that O-Town could own the Eldon station without contour overlap with KKSI, McVey called Bruce Linder and mentioned his interest in having O-Town pursue this allotment. Linder did not act interested (Tr. 243-245, 247). McVey did not consider applying for the station in his own name because he did not have the necessary financial resources and did not believe he could obtain them (Sample Ex. 5, pp. 1-2). McVey did not consider joining with Ms. Sample-Day in an application; he may have discussed with others the possibility of joining in an Eldon application (Tr. 249).

38. Although Bruce Linder was not interested in personally pursuing the channel, he thought that O-Town might be interested. He asked either Garret Lysiak of Owl Engineering or McVey whether there would be city-grade service contour overlap between KKSI and the new Eldon station (Tr. 304). From his broadcast knowledge, Linder believed that the FCC had policies (at that time) prohibiting people from having an active interest in more than one FM station with overlapping city-grade signal contours, and wanted to know if this would be a concern should O-Town decide to pursue the Eldon channel (Tr. 314). Linder believes that McVey informed him verbally that it was possible to locate the Eldon station so that its city-grade contour would not overlap that of KKSI. Shortly after learning of the Eldon allotment Linder asked Donald Linder, his father, whether he wanted to pursue the Eldon channel as an opportunity for himself or for O-Town. Donald was not interested. As a result, Bruce Linder let the matter drop for a while (Sample Ex. 3; Tr. 305).

39. After some time, Linder reconsidered his initial reaction toward the Eldon channel. He thought that it had some investment possibilities after all, and might be worth the risk of a start-up small business. He also decided that personally overseeing the Eldon operation would divert too much of his energies and attention from his required duties for KMHL Broadcasting Company, his employer in Mankato, Minnesota, and with the management at station KKSI. Linder decided that he would pursue the Eldon station only if he could combine with a qualified person who would be the active principal at the station. He wanted only a passive investment interest; one that would not require his time or attention (Sample Ex. 3).

40. Ms. Sample-Day learned about the channel allotment at Eldon from reading an article in a local newspaper in the summer of 1991. Prior to reading the article she may have been aware that the allotment had been proposed to the Commission (Tr. 113). Upon reading the newspaper article, she became very curious about the Eldon opportunity and considered filing for the Eldon facility as a sole proprietor. Two people with whom she spoke about the Eldon station were Bruce Linder and McVey (Sample Exs. 2, 3; Tr. 140).

41. Ms. Sample-Day approached McVey and said that she was interested in filing for the Eldon channel. She had known him through working at Station KKSI and was aware that he had been involved in the initial filing for the station. She respected his knowledge. She asked him to describe what was involved in the process, and whether he thought that the Eldon channel was a good idea. McVey told her that he thought that it was a good idea and that he had wanted O-Town to file for the channel (Sample Ex. 5, p. 2). McVey suggested some places where Ms. Sample-Day should look for names of engineers and consultants after she had indicated that she was interested in the Eldon channel (Tr. 253-254, 276).

42. Ms. Sample-Day had wanted to get into station ownership for quite some time. After she came to work at KKSI she would talk to McVey about his experience from time-to-time. McVey described the process of how to get into broadcast ownership because he wanted to be helpful (Tr. 251). McVey recalls discussing with Ms. Sample-Day that John and Donald Linder financed the Eddyville station. He does not recall telling her that she should seek out the Linders as a financial source for her application (Tr. 255).

43. At a luncheon meeting, Ms. Sample-Day broached the subject of the Eldon allotment to Bruce Linder and asked him if he knew what was involved in the application process. This was his first definite clue that Ms. Sample-Day had an interest in getting into ownership of the Eldon station. He gave her a very general overview of the steps involved. She then asked him if he was interested in the Eldon channel and would be willing to consider joining with her in applying for and pursuing the Eldon station (Tr. 141).

44. Linder told Ms. Sample-Day that he might be interested in joining with her in an application, but only as a passive investor with no responsibility for the management or operation of the business or the radio station. Linder told Ms. Sample-Day that he did not want to be involved with applying for or running the station, and would not be able to help her. He wanted her to take the responsibility and do the work needed for the station and the application (Tr. 311). Linder also knew that it was very important for FCC purposes that he have no active participation with the application or the radio station (Tr. 317). He anticipated other applicants for the construction permit and he did not want a weak comparative application (Sample Ex. p. 3; Tr. 307).

45. Linder first met Ms. Sample-Day in late 1990 or early 1991, a few months after she started working at station KKSI. Through her employment there, Linder observed that she is very good at working with others and is resourceful, competent and someone who has the ambition and ability to handle a start-up business and could make a good business partner (Sample Ex. 3). They had a number of formal and informal opportunities to get to know one another, including working together on making a film in the Spring of 1991 (Tr. 301-302). He decided that Ms. Sample-Day might be someone he could trust to run the station. He arranged to visit her to discover the possibility of the two of them joining forces to apply for the station. He had planned to mention the topic to her when she raised it first (Tr. 306).

46. Linder offered to secure the financing for the project if they went ahead. They discussed that he had resources to finance a commitment of that nature (Tr. 319). They made no decision at that meeting about joining together for the Eldon project, but agreed to talk again (Tr. 141). During several subsequent discussions, they talked about radio station operation, programming and formats. They discussed the general requirements of preparing and filing a construction permit application, the risks involved with a start-up business and whether the Eldon channel was worth pursuing (Sample Ex. 2, p. 3; Sample Ex. 3).

47. To get to know Ms. Sample-Day even better, Linder asked Ms. Sample-Day about her goals, aspirations, and employment history. It was most important to Linder that he be able to trust Ms. Sample-Day, because she would be responsible for making all decisions for the joint venture and the Eldon station. Through their discussions, she learned that many of their ideals and interests complemented each other. She believes him to be intelligent and trustworthy. She has always felt comfortable with him (Sample Ex. 2, p. 2).

48. Ms. Sample-Day took some time to consider her options and interests further to make sure that she was prepared and committed to undertake the responsibility of forming and being in charge of this new business. After a few days of consideration, she decided that she wanted to pursue the Eldon construction permit. The Eldon station would be a career and business opportunity for her and a chance to build a business in her field in the same general area where she was born and her father had been a member of the business community (Sample Ex. 2, p. 3).

49. In late August 1991, Linder and Ms. Sample-Day agreed to form the limited partnership and apply for the Eldon channel. Under their partnership agreement, Ms. Sample-Day contributes services only, sweat equity (Sample Ex. 1, p. 4). Ms. Sample-Day understands that, as the general partner, she is fully liable for the construction and operation expenses of the partnership (Tr. 129).

50. Linder did not envision at the time that he became involved in Sample that the Eldon station would make station KKSI more valuable. Ottumwa is the largest community within the signal coverage contours of KKSI and Sample's proposed Eldon station. At the time that Sample's application was filed, KKSI derived approximately 30% of its revenue from Ottumwa. Currently, it derives about 50% (Tr. 338). If Rivertown receives the Eldon construction permit, it will take some advertising revenue from KKSI

and in this way compete in the marketplace (Tr. 339). Linder also testified that in Mankato, Minnesota, and Eddyville, Iowa, two markets with which he is personally familiar, when a new station entered the market with attention-getting promotions, it stimulated the merchants' interest in radio and attracted attention away from newspaper and T.V. advertising. This made it easier to sell radio advertising and created increased sales and profits from the radio stations in the market (Tr. 343).

51. Linder treats his interest in O-Town as an entirely separate business venture from his interest in Sample. As a voting shareholder of O-Town, he has a voice in the operation and management of station KKSI. There has never been any discussion between Ms. Sample-Day and Linder regarding the joint operation or programming between KKSI or O-Town and the proposed Eldon station. He has not spoken about these subjects with anyone. O-Town has made no arrangements, and has no plans or understandings with Sample or Ms. Sample Day regarding the Eldon station. There are no plans or arrangements to have any type of joint relationship between the two stations (Sample Exs. 1, 3).

52. Upon agreeing to form the limited partnership, Ms. Sample-Day began to take steps to prepare and file the construction permit application (Sample Ex. 2, p. 3; Sample Ex. 3; Tr. 301). Linder left Ms. Sample-Day in total charge of the application process. While he suggested some names and listings of consultants, Ms. Sample-Day was solely responsible for selecting and hiring all of the consultants she felt she would need to prepare and file the Eldon application. After speaking with several potential communications counsel, she selected and retained Miller & Fields, P.C. (now Miller & Miller, P.C.) (Tr. 112). She relied on communications counsel to outline the steps required for preparing and filing the Eldon construction permit application. She spoke to several broadcast consulting engineers before retaining Owl Engineering. She selected McKay, Moreland & Webber as local counsel to assist in drafting the written limited partnership agreement to memorialize the understanding which she and Linder reached. The selection of these consultants was Ms. Sample-Day's decision entirely; Linder had no control over her decision to hire any consultant (Sample Ex. 2, p. 4; Sample Ex. 3, p. 3; Tr. 127, 152).

53. At Ms. Sample-Day's request, Owl Engineering sent a map to her showing the permissible Eldon transmitter site area so that she could begin to locate a suitable site. The map was identical to the first map which Owl Engineering sent to McVey (Rivertown Ex. 6; Tr. 217). She had difficulty interpreting this map and asked McVey for help in locating a site (Tr. 258-259). At his suggestion, she obtained more detailed 7.5 minute survey maps directly from the U.S. Geological Survey Bureau. She did not understand the USGS markings and asked McVey's further assistance in locating a transmitter site (Sample Exs. 2, 5; Tr. 259).

54. Ms. Sample-Day was concerned that the larger towns such as Ottumwa might be over-saturated radio markets, did not want the Eldon station to have to rely entirely on them for revenue, and wanted to be able to offer signal coverage to advertisers in stable but less radioed areas such as Van Buren county to the south of Eldon. Ms. Sample-Day decided that she wanted to serve Fairfield, Bloomfield and Ottumwa, Iowa, and Van Buren county including such towns as Keosauqua, Iowa. By looking at the maps, McVey was able to point out the general land area which would allow her to serve the areas she had in mind (Sample Ex. 2, 5; Tr. 209-210).

55. McVey told her that they would need to look at the area in person. He suggested that they first investigate land near the town of Leando which appeared from the map to be high, flat and near a highway and microwave tower. They went together and McVey pointed out several areas that appeared to be large enough, near a power line, accessible to the highway, and cleared of trees (Sample Ex. 2, 5). McVey and Ms. Sample-Day made a second trip to the same area to get more information. Ms. Sample-Day made a third trip on her own to look for alternate land (Tr. 154).

56. Ms. Sample-Day spoke with the owners of three potential tower sites and personally negotiated the terms of the assurance for the site she ultimately selected. No one assisted her. Later, when this site was sold, she pursued and obtained reasonable assurance of the site's continued availability from the new owner. She did not consult with Linder, and he did not offer any advice to her with regard to selecting the tower site. Ms. Sample-Day first told Linder where the tower site would be after Owl Engineering completed the engineering portion of Sample's application (Sample Exs. 2, 3).

57. At the time that he assisted in locating the tower site McVey knew that Ms. Sample-Day had joined with Bruce Linder to file the application, but he had no knowledge of the terms of the arrangement between them. Neither Linder nor Ms. Sample-Day volunteered the nature of Sample with McVey. He never asked and could only assume that Bruce Linder would be a voting shareholder of Sample (Sample Ex. 5, p. 4).

58. McVey did not consult with Bruce Linder or anyone else about the site Ms. Sample-Day selected (Sample Ex. 5, p. 10). Although Ms. Sample-Day did not mention any concern to McVey about possible overlap with Station KKSI, he assumed that she would have to select a tower site which would not cause overlap with the 70 dBu contour of KKSI (Tr. 210, 261). McVey did not ask Ms. Sample-Day to confirm this assumption. He does not know what site she selected ultimately, and has never spoken about Sample's site with Bruce Linder (Sample Ex. 5).

59. Ms. Sample-Day developed the applicant's proposed construction and operating budget from a number of independent sources. As she was preparing this budget she requested and received a written price quote from Harris-Allied and she solicited McVey's verbal opinions on the cost, availability and advisability of certain pieces of equipment which she was contemplating for use at the new station (Tr. 270, 274). He also provided additional sources for equipment costs. She did not seek any budget information from Linder. In order for him to know the exact amount of financing to secure, Ms. Sample-Day advised Linder of the total amount needed for construction and operation, after the budget was finalized. He thought the numbers seemed reasonable and did not question how she arrived at them. The partnership paid McVey for all services rendered to Ms. Sample-Day (Sample Exs. 2, 3, 5; Rivertown Ex. 11; Tr. 150, 177-178, 180-181, 204).

60. The understanding between Ms. Sample-Day and Linder from the outset was that he would finance the construction and initial operation of the station (Tr. 331-2). On October 9, 1991, Linder faxed Ms. Sample-Day two letters, each dated October 9: (1) a letter from the American Bank of Mankato, setting forth its willingness to lend Bruce Linder $300,000 "to finance your investment in"

Sample Broadcasting Company, under terms calling for payment of interest only for the first six months, and payment of principal and interest amortized over the next 60 months, to be secured by a first lien on the station's assets and the personal guarantee of Bruce Linder; and (2) Bruce Linder's letter to Ms. Sample-Day, agreeing to loan the partnership $300,000 on the same terms and conditions as the American Bank's letter offered to him (Tr. 333-334). Linder acknowledged that he would have the rights of a creditor against the partnership (Tr. 335).

61. Ms. Sample-Day established the applicant's bank account and is the only person who has ever been authorized to sign checks on behalf of the applicant. She receives all invoices and bills for the applicant and has been solely responsible for paying all of the applicant's bills (Sample Ex. 2).

62. She established the local public inspection file in Eldon and arranged for publication of the public notices that the application was filed with the FCC and, later, that it had been designated for hearing (Sample Ex. 2).

63. She spoke with a property owner in Eldon about a potential lease of space for a broadcast studio (Sample Ex. 2).

64. Ms. Sample-Day received an invoice from Owl Engineering dated September 23, 1991 (Rivertown Ex. 8). She assumed that the invoice reflected services she requested, and paid it without verifying the charges (Tr. 162). This bill includes a $200 charge for a September 13, 1991, 70 dBu Overlap Study. While preparing for hearing, Ms. Sample-Day was reviewing documents with counsel when he asked her to explain the September 13, 1991, item. Ms. Sample-Day does not recall receiving anything from Owl Engineering dated September 13, 1991, and did not understand the charge. She then called Owl Engineering for an explanation. Owl Engineering told her that, indeed, she had not ordered any overlap study and that the charge was a mix-up and was meant for Mark McVey (Tr. 164, 165). Owl Engineering issued a corrected invoice to Sample and refunded the mischarged $200 (Rivertown Ex. 9). McVey was charged for the study (Rivertown Ex. 17; Tr. 263, 281).

65. In consultation with her attorneys and engineer, Ms. Sample-Day has made all decisions and taken all other steps needed to prepare and file Sample's Eldon construction permit application. Ms. Sample-Day has never asked Linder to make a decision for her or to ratify any decision which she has made concerning the application or the proposed station. Bruce Linder testified that he has exerted absolutely no influence over her decisions concerning the Eldon station or the partnership and will not do so in the future. He has offered no advice (Sample Ex. 2, 3; Tr. 332).

66. When O-Town first applied for station KKSI, McVey was the 100% voting shareholder of the applicant corporation (Tr.219). He paid about $10,000 of his own money toward the preparation, filing and prosecution of the Eddyville application (Tr. 230). When the person who agreed to fund the construction and initial operation of the station died, his heir did not want to assume the financial obligation. To find substitute financing, McVey visited four lending institutions without success. He also spoke with John Linder, who was interested in the project but no terms were discussed. McVey was familiar with John Linder because he had worked for him previously. McVey continued to search for financing (Tr. 220, 280).

67. As the comparative hearing was approaching, McVey knew that he did not personally have the required funds so he reached an agreement with John Linder, the only party he had located who would provide financing (Tr. 281). John Linder and his father, Donald Linder, agreed to loan funds for the construction and operation of the Eddyville station and to pay for a settlement whereby a competing applicant would dismiss its application for cash proceeds. In exchange for the needed financing, McVey agreed to convey a 49% equity interest in O-Town to John Linder and his father with an understanding that they would acquire a controlling equity interest at some future point (Tr. 221-222). John and Donald Linder received a total of 49% voting stock in exchange for their settlement and construction loans to O-Town. They received an additional 31% through Commission approval of an FCC Form 315 application filed by O-Town in December 1990 (Tr. 225-227).

68. Sometime between March 8, 1991, and September 1, 1991, Bruce Linder acquired 25% of O-Town voting stock from Donald and John Linder. Before the conveyance occurred, McVey was consulted for his approval. At that point McVey had known Bruce Linder for about seven years (Tr. 240). McVey works at KKSI and wants to see it and O-Town succeed to the greatest extent. He is quite pleased that the station has developed beyond his original expectations (Sample Ex. 5).

69. O-Town's development has not been without frustration for McVey, however. Many of his ideas for the station have been rejected by the other shareholders of O-Town. For example, recommendations about a different studio location, that the station should be more regional in its appeal, about certain equipment purchases and about certain hiring choices have not been adopted. While he realizes that as a minority voting shareholder he cannot force O-Town to take any specific actions, he freely admits to becoming frustrated and even angry from time-to-time that more of his suggestions are not implemented. These feelings have sometimes resulted in mean-spirited statements about his fellow principals which are not based in fact (Sample Ex. 5).

70. At one instance, at 10 p.m. on January 18, 1992, McVey arrived at station KKMI, Burlington, Iowa, to perform transmitter maintenance. As KKMI's general manager, David Brown was present when McVey arrived. According to Brown, McVey brought up the subject of the Rivertown and Sample applications for Eldon and stated that the Sample application had been filed to delay the grant of Rivertown's, or to prevent Mr. Brown from getting the Eldon station. Also, that the Sample transmitter site had been selected to avoid city-grade contour overlap with KKSI, to enable Bruce Linder to have ownership interests in both stations, and that the Linders were using Carmela Sample-Day because of her minority status. Brown claims that McVey said that Ms. Sample-Day was bragging about what she was going to do with the Eldon station if her application is granted, and that, in McVey's opinion, she failed to recognize that Bruce Linder will be controlling her and the station. At approximately 11:15 p.m. McVey and Brown went to the KKMI transmitter site. Brown returned to the studios about midnight, in order to feed test signals to the transmitter to assist McVey. McVey returned to the studios shortly after 1:30 a.m. He finished his work and left about 3:30 a.m. Brown emphasized in his written testimony that the conversation concerning Eldon occurred at the KKMI studios prior to going to the trans-

mitter -- that is, between 10 and 11:15 p.m. -- *not* (emphasis in original) at 3 a.m. (Rivertown Ex. 4, ¶ 4). Under cross-examination, Brown could not recall at what point during the period between 10 and 3:30 that the discussion about Eldon took place (Tr. 93-94).

71. Mark McVey and David Brown have been acquainted for ten to twelve years, and at times have worked together at the same station (Sample Ex. 5, p. 6; Rivertown Ex. 4, p. 1). They have had at least three conversations concerning the Eldon channel allocation and the Sample application and the Sample application.

72. According to Brown, their first conversation occurred in June 1991, when Brown was visiting McVey at his home in Ottumwa, Iowa. During this visit, McVey mentioned Brown's pending petition for the allotment of channel 282 to Eldon, Iowa, and asked Brown to consider rebroadcasting KKSI-FM if he were to be awarded the Eldon permit. Brown asked McVey whether the Linders were aware of his Eldon petition, and he said that they were. Brown asked if they planned to file an application for Eldon, and McVey responded that he didn't know (Rivertown Ex. 4, p. 1).

73. Their second conversation relating to Eldon occurred on January 18, 1992, when McVey was at KKMI-FM, Burlington, Iowa (where Brown was employed as station manager), to perform maintenance on its transmitter. While they were at the studios, McVey brought up the subject of the Eldon applications of Rivertown and Sample, and (according to Brown) stated that the Sample application had been filed to delay the grant of Rivertown's, or to prevent Brown from getting the Eldon station. McVey told Brown that the Sample transmitter site had been selected to the southeast of Eldon to avoid city-grade contour overlap with KKSI-FM, to enable Bruce Linder to have ownership interests in both stations; that the Linders were using Ms. Sample-Day, KKSI's news director, because of her minority (Hispanic) status. McVey told Brown that Ms. Sample-Day was bragging about what she was going to do with the Eldon station if her application is granted, and that, in his opinion, she had failed to recognize that Bruce Linder will be controlling her and the station (Rivertown Ex. 4, pp. 2-3).

74. Their third conversation concerning Eldon took place on March 17, 1992, when they had dinner together at the Southside Pizza Hut in Ottumwa. According to Brown, McVey brought up the Eldon situation, and stated that he had been asked by the Linders to find a transmitter site for the Sample application which would enable city-grade coverage of Eldon without overlapping the city-grade contour of KKSI: that, if Sample is successful, they plan to simulcast KKSI-FM: and that, although he was not familiar with the details concerning the arrangement between Ms. Sample-Day and Bruce Linder, he was certain that the Linders would not let her manage the Eldon station, because of her lack of management experience (*Id.*, pp. 3-4).

75. McVey remembers Brown asking during dinner whether Sample would have an LMA with KKSI, should it get the station. He believes that he responded to the effect that whoever got the permit at Eldon should seriously consider a joint programming arrangement (Tr. 267). McVey was not aware of Ms. Sample-Day's plans for operating the station and would have had no basis to describe as a fact anything about her programming plans. He had not spoken to Linder, Ms. Sample-Day, or anyone else about Sample's plans for the Eldon station, and had seen no documents describing any plans. McVey was unaware of any plans or proposals O-Town have had with respect to the Eldon station (Sample Ex. 5; Tr. 256-257, 166).

76. McVey has spoken to Ms. Sample on occasion about the progress of her application; working for the same station they see one another from time-to-time. Their conversations in this area are generally short, and do not get into detail. Ms. Sample-Day has always been very enthusiastic about the opportunity the application presents for her to manage the Eldon station and get into station ownership. However, she has never described any of her plans with McVey. She has always come across to McVey as a serious and independent applicant (Sample Ex. 5, p. 9).

77. If he made the statements Brown alleges, McVey is sure that they were the result of his feelings of frustration that more of his suggestions at KKSI were not adopted; they were not based on fact or personal knowledge. He had no knowledge of any facts and was not aware of discussions which would have led him to make such statements. He never discussed with anyone a possible motive for the filing of the Sample application. He has not seen anything in writing on this subject. He was not speaking on behalf of O-Town. If McVey made any of the statements ascribed to him by Brown, they were nothing more than off-hand comments made against Bruce Linder at a time when his frustration about KKSI was heightened (Sample Ex. 5).

78. McVey now knows that Ms. Sample-Day is to be in complete control of the Eldon station, and Linder will be a passive owner. He has known Ms. Sample-Day and Linder for a number of years and has every reason to believe that their operation will be completely above-board and that they will conform to all representations they have made to the FCC (Sample Ex. 5, p. 8).

79. Brown believes that McVey was only speculating (on January 18, 1992) that Ms. Sample-Day would find that she would be controlled by Bruce Linder. Nothing McVey said in the several conversations on other issues led Brown to believe that McVey was only expressing his personal opinions rather than his knowledge of events and decisions which had been made at KKSI. Thus, Brown believes that it was reasonable to assume that McVey's statements were both knowledgeable and an accurate reflection of the intentions of O-Town in Sample's Eldon application (Rivertown Ex. 4, ¶ 8).

80. Collins left the employ of KKSI in August 1991, to accept employment at Station KKMI, where he continues to be employed. David Brown is general manager and Collins' supervisor at KKMI. On Approximately April 1, 1992, McVey telephoned Collins at KKMI, to inquire whether Collins would consider coming back to work for KKSI. McVey placed the call on his own, with no prior discussion with Bruce or Donald Linder. Bruce Linder and the KKSI general manager make the hiring decisions for the station. During the call McVey brought up the subject of tying KKSI and the Eldon station together. To Collins, these matters seemed loosely put by McVey, and more in the nature of "tossing ideas around" rather than any coherent plan (Rivertown Ex. 5, ¶ 2; Tr. 235, 236).

81. McVey testified that he has no knowledge of the reasons why the Sample Application was filed other than Ms. Sample-Day's statement that she wants to get into station ownership. He has no basis to believe that it was filed to delay action upon any other application or to keep another applicant from being granted. McVey has no knowledge nor reason to believe that anyone other than

Ms. Sample-Day has been and will continue to be in full and complete control of the Sample partnership (Sample Ex. 5, p. 10).

82. Although he thinks it makes economic sense, McVey has no knowledge of any plans or understanding to duplicate programming of KKSI on the Eldon station, regardless of who receives the construction permit. McVey is not aware of any discussions in which a possibility was considered by anyone with the authority to make such a decision at KKSI (Sample Ex. 5, p. 10).

83. McVey holds a First-Class Radiotelephone license and is a principal in a broadcast licensee. It is his responsibility and desire to be completely honest with the FCC. He regrets any comments he may have made which gave anyone the impression that KKSI and the Eldon station would be jointly operated or that Linder would control Ms. Sample-Day or be in charge of the Sample application. As he testified, he has no fact to support such comments (Sample Ex. 5, p. 10).

## CONCLUSIONS OF LAW

### Sample's Basic Qualification Issues

#### Issue (1) Strike Application

84. Rivertown does not attribute to Ms. Sample-Day any intention to delay action upon and grant of the Rivertown application. However, Rivertown maintains that Bruce Linder in behalf of O-Town Communications did intend to delay such action and took steps to do so. The bottom line for Rivertown is that O-Town Communications benefitted for at least two years by Rivertown's absence from competition. Rivertown sees Bruce Linder's actions to be directed toward this goal. Rivertown notes that although Bruce Linder was at first disinterested in the Eldon allocation, he did not explain on the record what caused him to abandon his initial disinterest. Rivertown also notes that KKSI derives 50% of its sales revenue from the city of Ottumwa and submits that Linder wanted to protect that.

85. The record proves Rivertown's allegations to be speculative. There is no record evidence of Bruce Linder's intent to delay action on Rivertown's grant. Indeed, the record demonstrates that Linder individually and O-Town Communications were free of anti-competitive motive. Neither O-Town Communications nor Bruce Linder filed comments during the rulemaking proceeding opposing the Eldon allotment. The Commission was allotting FM channels to a number of other communities in Southeastern Iowa at about the same time as the Eldon allotment. These stations would also compete in Ottumwa and yet neither O-Town Communications nor Linder took any action to retard grants for those allocations. Bruce Linder's initial disinterest is proof that he wasn't concerned over competition. Stronger proof is Donald Linder's disinterest. He is O-Town Communications' major stockholder. The record indicates that Bruce Linder became interested when he came to appreciate that Eldon would be a good investment and became convinced that with Ms. Sample-Day's involvement the operation would be feasible. The issue IS RESOLVED in Sample's favor.

#### Issues (2) and (3) - Real Party-in-Interest; Linder's Actions as Passive Investor

86. Enlarged Issue (2) seeks to determine whether O-Town Communications or any of its officers, directors, and stockholders is a real party-in-interest to the Sample application; enlarged Issue (3) seeks to determine the extent of the involvement of Bruce Linder in the planning and development of the Sample application.

87. The test for the real-party-in-interest against Sample is whether O-Town has an ownership interest or is or will be in a position to control the operation of the proposed station. *Sound Broadcasting Co.*, 6 FCC Rcd 6903, ¶ 4 (1991). The record demonstrates that O-Town, its principals and Bruce Linder have had and will have no involvement or control over Sample, and that they have no connection other than Bruce Linder's position as a passive limited partner. Under Sample's limited partnership agreement, Linder is properly insulated from involvement under the Commission's non-attribution requirements for limited partners. *Ownership Attribution*, 58 RR 2d 604 (1985).

88. Rivertown argues that documents and agreements notwithstanding, Bruce Linder is a real party-in-interest and has dominated the control over Sample's application for the following reasons:

1. It was Linder who asked McVey to determine whether the Eldon station could be engineered to avoid 70 dBu overlap with KKSI;

2. It was Linder who suggested the limited partnership arrangement;

3. Linder totally financed the prosecution of the Sample application; and

4. Ms. Sample-Day was guided through the process by McVey, O-Town's 20% stockholder; and that Ms. Sample-Day has limited broadcast experience, has no business experience and has made no financial investment.

89. Additionally Rivertown puts no stock into McVey's explanation that his statements to Brown that the Sample transmitter site was selected to avoid 70 dBu overlap with KKSI were based on his misunderstanding of the passive role of Linder. Rivertown also discounts Ms. Sample-Day's stated belief that 70 dBu overlays with KKSI was to be avoided because of interference considerations.

90. The record, however shows that Rivertown's conclusions are not warranted. The record reflects that McVey contacted Owl Engineering to commission a study of an area to locate a transmitter site for the Eldon allotment strictly on his own. McVey, of course, has no independent ability to make policy on behalf of O-Town Communications. McVey paid Owl Engineering for its services out of his own funds. Donald Linder, O-Town Communications' majority stockholder, decided that O-Town Communications was not interested in the Eldon allotment. There is no record evidence that O-Town Communications took any steps to apply. Brown concedes that McVey was only speculating that Ms. Sample-Day would be controlled by Linder and admits that he has no information of the truth of McVey's statements to him.

91. Although McVey acted as Ms. Sample-Day's consultant, he did so on an individual basis and was not acting on behalf of O-Town Communications. Ms. Sample-Day had worked for KKSI and knew of McVey's abilities. The Sam-

ple partnership paid McVey for his consulting services which consisted of locating a tower site, supplying cost estimates of certain materials as well as their availability and advisability. The record shows that McVey did not know the details of the business relationship between Ms. Sample-Day and Linder and presumed that Bruce Linder would be a voting shareholder. It was this assumption that caused him to believe that the Eldon application's 70 dBu would have to clear to 70 dBu contour of KKSI. McVey's explanation is credible and is fully credited.

92. The record also reflects that Ms. Sample-Day has a college degree in communications and ten years of broadcast experience. Linder had occasion to observe her work at KKSI. Linder told Ms. Sample-Day at the outset that he would not be able to be involved in the management of the proposed station. He wanted a strong application with a local resident willing to work at the station. Linder and Ms. Sample-Day negotiated their 60-40 equity split. Although Ms. Sample-Day made no monetary investment she was the sole driving force behind the preparation, filing and prosecution of the Sample application. As general partner she is personally liable for the debts of the partnership.

93. Ms. Sample-Day unilaterally selected her counsel and engineer. She did not clear her choices with Linder. Ms. Sample-Day was entirely free to select any consultants she felt she would need to assist her in preparing and filing the application.

94. Linder agreed to secure financing for the applicant. In this regard, Ms. Sample-Day reviewed Sample's budget with Linder so that he would know the amount of funds he would have to obtain. Linder had no involvement in developing the budget and did not attempt to change or challenge Ms. Sample-Day's figures. He had no involvement in selecting Sample's tower site, or in any other aspect of Sample's application. In short, Linder's pre- and post-formation involvement in the application is entirely consistent with his position as a passive, fully-insulated limited partner. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991).

95. Ms. Sample-Day affirms that, as the general partner, she is the sole active principal of Sample. As the sole general partner, she has made all decisions on behalf of the applicant and will continue to do so in the future. The record fully supports a conclusion that she will be in complete overall control of the Eldon station. The control Issues (2) and (3) ARE RESOLVED in Sample's favor.

**Issue (4) Programming Issue**

96. Sample's application lists the programming it intends to provide. There is no record evidence that contradicts this representation. Although McVey thought that duplicate or shared programming made economic sense, he testified that he never meant to suggest that there was any arrangement or understanding between Sample and O-Town on the matter. As a matter of fact he never discussed with Ms. Sample-Day programming. The issue IS RESOLVED in Sample's favor.

**Issue (5) Misrepresentation Issues**

97. The basic issues were added because McVey, an officer of O-Town was unable to recall making the exact statements Brown alleges. There is no independent evidence that McVey's statements were anything other than unfounded comments. Brown was only able to speculate by assuming that McVey had a basis for the alleged statements. David Collins, an independent third party who presented testimony on behalf of Rivertown, stated that McVey's comments to him were loose talk, not serious and in the nature of tossing ideas around. This fully supports McVey's explanation that he could not have meant his remarks as Brown understood them; McVey had no knowledge of the relationship between Ms. Sample-Day and Linder, no information that Linder or O-Town would have anything to do with the operation of the Eldon station and no other facts upon which to base such remarks. There is no evidence that Sample or its principals have made any misrepresentations to the Commission or that there is any risk that Sample cannot be expected to fulfill its representations and be completely candid with the Commission. Accordingly, the misrepresentation issue IS RESOLVED in favor of Sample.

**Standard Comparative Issues**

**Rivertown Communications Co. Inc.**

98. *Diversification.* Neither Rivertown nor either of its principals have any chargeable media interests. Sample argues that David Brown ought to be charged on account of his management position at Station WAIK and WCBQ, Galesburg, Illinois, in 1991 because the reporting amendment was filed late. Brown entered into a contract of employment on May 8, 1992, to commence May 26, 1992;[2] the contract specifically noted the pendency of Rivertown's Eldon application and reserved to him the right to terminate the employment upon ninety days notice in the event of a grant of Rivertown's application. He executed Rivertown's amendment reporting this employment, and reiterating his application pledge to divest any conflicting employment in the event of a grant of Rivertown's application, on June 30, and it was filed July 7, one day after its receipt in Washington. Thus, Rivertown's amendment was filed just 42 days after the employment commenced; and just twelve days beyond the thirty-day period specified in ¶ 1.65 of the Rules. Sample's argument here is a rehash of its predesignation argument which was considered and rejected in the *Hearing Designation Order*, at footnote 2.

99. *Integration Into Management.* Rivertown is credited with 100% full-time integration. Sample argues that Rivertown should be credited only with Brown's equity interest (55%) because it has failed to prove that Ellen Bowen will have a meaningful management and policy making position, or, at best, Rivertown should be credited with one-half of Ellen Bowen's equity interest because David Bowen is a joint owner of Ellen Bowen's stock in Rivertown. Additionally, Sample states that David Bowen has agreed to loan money to Rivertown, will be involved in construction of the proposed station, has jointly purchased David Brown's Eldon residence which will serve as Rivertown's broadcast studios and was present with his wife at most of her meetings with David Brown and at the

[2] A copy of the employment agreement (redacted) is attached to Rivertown's Exhibit 15.

hearing session herein. Citing *Richard P. Bott, II*, 4 FCC Rcd 4924, 4929-30 (Rev. Bd. 1989), *rev. denied*, FCC 90-109 (released April 12, 1990), Sample believes David Bowen should be held to have a mutual ownership stake with his wife and be considered to be an integrated owner of half of his wife's interest.

100. The record, however, reflects that no decision on Rivertown's studio location has been made (Tr. 69), but that David Bowen may help install heating and air conditioning at Rivertown's studio building when one is acquired. This does not amount to being involved in the construction of the proposed station. Further, the record shows that David Brown and Ellen Bowen held meetings in the Bowen home (Tr. 67) and that although David Bowen accompanied Ellen Bowen to Washington, D.C. for a hearing, so did his daughter taking advantage of the travel for sightseeing purposes (Tr. 44). Additionally, although it is true that Ellen Bowen's stock was purchased with money from a joint account, and that David Bowen agreed to lend Rivertown $15,000, the Review Board in *Bott, supra*, at 4929, stated that the use of funds for prosecuting the application and constructing the proposed station is not determinative of impermissible involvement. In *Lone Cypress Radio Associates, Inc.*, 7 FCC Rcd 4403 (Rev. Bd. 1992), review denied 8 FCC Rcd 972, recon. denied, 8 FCC Rcd _____, 1993, *Memorandum Opinion and Order*, adopted August 30, 1993; see Report No. DC-2486 of September 1, 1993, the husband of one of the general partners attended partnership meetings with his wife, made financial contributions to the partnership through his wife's use of their joint assets, attended the depositions and the hearing, and was kept current on the progress of the application by this wife. There, the Board found no basis for discrediting the wife's proposed integration, specifically distinguishing *Bott, supra* on its facts.

101. Ellen Bowen is proposed to work full time as a business manager. The position of "Business Manager" is recognized by the Commission as a management position entitling one to integration credit. Ms. Bowen's integration proposal and her activities in connection with the application are not significantly different from those found by the Review Board to warrant integration credit in *Harry S. McMurray*, 8 FCC Rcd 3168, 3171 (Rev. Bd. 1993). Her proposal is fully credited.

102. Rivertown's integration is enhanced by David Brown's long term residence in the service area and Ms. Bowen's residence in the service area since 1979. Rivertown's application at Exhibit IV-B did not list Brown's residence in the service area from December 1984 to July 1986. The omission was an oversight, but in any event does not significantly affect Brown's substantial long-term residence.

103. Rivertown's integration is not entitled to a civic activities enhancement. Brown lists civic activities during 1982-1983, 1988-1989. However, Brown does not, except for stating membership, identify what activities were performed. His promotion of fund raising for new uniforms for Ottumwa High School in 1982 is too remote to receive any credit. Ms. Bowen also fails to state what civic activities she may have engaged in.

104. Rivertown's claim for a pioneer preference for having found and allotted Channel 282C3 to Eldon is rejected. There is no Commission rule or policy which provides for a pioneer's preference under this circumstance. The Commission is considering a Notice of Proposed Rule Making ("NPRM"), part of which concerns a possible "finder's preference" for successfully requesting the allotment of a new broadcast facility. However, that proposal has not been adopted. In addition, the Commission stated in the NPRM that it intends to apply any ultimately adopted proposals "to all applicant's not in hearing as of the effective date of" the adoption of the proposals. *Reexamination of the Policy of Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, ¶ ¶29, 41 (1992). Rivertown's request for a pioneer preference IS DENIED.

**Sample Broadcasting Company, L.P**

105. *Diversification.* Neither Sample or its principals have any attributable interest in a medium of mass communications.

106. *Integration Into Management.* Sample is credited with 100% full-time integration. Ms. Sample-Day has pledged to work full-time at least 40 hours per week. She is a college graduate having earned a communications degree. She has been the sole direct control of the preparation and prosecution of Sample's application.

107. Sample's integration is enhanced by her local residence within the service area since 1988.

108. Sample's integration is further enhanced by Ms. Sample-Day's civic activities. She was involved in producing television shows on such social issues as narcotics, teen pregnancy, and agriculture. The Commission's civic enhancement credit is awarded to those applicants who demonstrate involvement with and knowledge of the needs and interests of the area they propose to serve. That some of her civic activity has been employment-related does not negate enhancement credit. *Eve Ackerman*, 7 FCC Rcd 2493 (Rev. Bd. 1992).

109. Sample's integration is also credited with Ms. Sample-Day's broadcast experience.

110. Sample also receives minority enhancement credit for Ms. Sample-Day's hispanic origin. *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985). It is undisputed that her mother and maternal grandparents are full-blooded Hispanic, born in Mexico. Ms. Sample-Day lived in Mexico from 1971 to 1988, was educated there, and Spanish is her primary language. The Commission defines a member of the Hispanic minority as: "A person of Mexican ... or other Spanish Culture or origin, regardless of race." *Storer Broadcasting Company*, 87 FCC 2d 190, 192-193 (1981). The ancestry may be as little as one-quarter Hispanic (half as much as Ms. Sample-Day) to receive minority enhancement credit. In *Hispanic Keys Broadcasting Corp.*, 3 FCC Rcd 3584 (1988), city *KIST Corp.*, 99 FCC 2d 173, 193, 195 (Rev. Bd. 1984) *modified on other grounds*, 102 FCC 2d 288, 193 (1985), a principal was granted minority enhancement credit based solely on having one grandparent of Cuban origin.

111. The fact that the FCC Form 395, Annual Employment Report, filed by KIOA(TV) for January 1990, a period when Ms. Sample-Day worked at the station, did not reflect any hispanic employees is of no significance. The record is silent on the way KIOA's report was completed. No representative of KIOA explained its report.

112. Sample is also credited with a preference for its auxiliary power proposal.

**ULTIMATE CONCLUSIONS**

113. Rivertown and Sample each are basically qualified and each have received 100% integration credit. Rivertown is credited with substantial preference for the long term local residence of its principals and substantial preference for the broadcast experience of its principals. Sample has been credited with 100% minority preference, 100% short term local residence (moderate), 100% civic activities, 100% short term broadcast experience (moderate), and auxiliary power. Sample's credits outweigh Rivertown's. Sample is the winner.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Sample Broadcasting Company, L.P. (File No. BPH-911010MA) IS GRANTED, and the application of Rivertown Communications Co. Inc. (File No. BPH-911008ME) IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Acting Chief Engineer

**ET Docket No. 93-235**

Amendment of Parts 15 and 90 of the Commission's Rules to Provide Additional Frequencies for Cordless Telephones — RM-8094

## ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

**Adopted: November 3, 1993; Released: November 5, 1993**

**Comment Date: December 8, 1993**
**Reply Comment Date: December 23, 1993**

By the Office of Engineering and Technology:

1. On October 18, 1993, the American Petroleum Institute (API) requested that the time for filing comments to the *Notice of Proposed Rule Making* (*NPRM*) in the above-captioned proceeding be extended from November 8, 1993 to December 8, 1993 and that the reply comment date be extended from November 23, 1993 to December 23, 1993.

2. In its request, API indicates that a 30 day extension of the comment periods would facilitate a full discussion of the issues at API's Telecommunications Committee meeting on November 17-19, 1993, and would allow finalization of API's comments, which it believes are essential for the development of a full record in this proceeding.

3. The Commission does not routinely grant extensions of time.[1] In this instance, however, we believe that extending the comment deadline by 30 days will serve the public interest by providing the petroleum and natural gas industry additional opportunity to reach a consensus on the proposals set forth in the *NPRM* and would result in an improved record being submitted to the Commission. We also believe it is in the public interest to extend the reply comment deadline correspondingly. Accordingly, IT IS ORDERED THAT the deadline for filing comments IS EXTENDED to December 8, 1993, and the deadline for filing reply comments IS EXTENDED to December 23, 1993.

4. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46. For further information, contact George Harenberg, Office of Engineering and Technology, (202) 653-7314.

[1] 47 CFR Section 1.46 (1991).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

US SPRINT COMMUNICATIONS COMPANY,
LIMITED PARTNERSHIP,
Complainant,

v. File No. E-89-277

AT&T COMMUNICATIONS,
Defendant.

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 1, 1993; Released: November 8, 1993**

By the Acting Chief, Common Carrier Bureau:

## I. INTRODUCTION

1. US Sprint Communications Company Limited Partnership (US Sprint) filed a formal complaint pursuant to Sections 206-209 of the Communications Act of 1934, as amended (the "Act"),[1] against AT&T Communications (AT&T) on July 21, 1989, alleging that AT&T has bundled network services with customer premises equipment (CPE) in violation of Sections 202(a) and 203(c) of the Act[2] and the Commission's rules. As a result of this allegedly unlawful conduct, US Sprint claims to have lost a major customer and seeks a Commission order requiring AT&T to notify this and other customers that a subscription to AT&T's network services is not a prerequisite to obtaining discounts or other promotional concessions on AT&T's CPE. For the reasons set forth below, we deny US Sprint's complaint.

## II. BACKGROUND

2. The focus of US Sprint's complaint concerns AT&T's sales and marketing effort to acquire Service Corporation International (SCI) as a customer for its Software Defined Network (SDN) service after SCI had agreed to designate US Sprint as its primary carrier. US Sprint maintains that AT&T's success in dealing with SCI derived from its offer of SDN rates which were not on file in its SDN tariff, in violation of Sections 202(a) and 203(c) of the Act.[3] In addition, US Sprint contends, AT&T offered to provide free and discounted CPE as part of the SDN service. Such an offer, according to US Sprint, constituted an unlawful rebate in further violation of Section 203(c) of the Act.

3. US Sprint then contends that by conditioning the availability of free or discounted channel bank equipment upon the taking of SDN transmission service, AT&T violated rules established by the Commission in its *Computer II* decision,[4] which prohibited bundling of CPE and network services.

## III. DISCUSSION

### A. Bundling

#### 1. Contentions of the Parties

4. US Sprint claims that by offering to "bundle" CPE with its offer of SDN service, AT&T effectively was able to offer SCI a monetary inducement of $500,000 to $1,000,000 to subscribe to its SDN service.[5] Specifically, US Sprint alleges that AT&T offered free or discounted PBX, channel bank, and computer equipment on the condition that SCI subscribe to SDN service in violation of Sections 202(a) and 203(c) of the Act and the Commission's *Computer II* rules.[6]

5. In support of this proposition, US Sprint cites extensively from its direct dealings with SCI. It particularly notes instances where US Sprint was told by SCI that it would have to match various AT&T monetary concessions, particularly with respect to CPE, in order to acquire its transmission service business.[7] According to US Sprint, SCI

---

[1] 47 U.S.C. §§ 206-208.
[2] 47 U.S.C. §§ 202(a) and 203(c).
[3] Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 203(c) states:

> No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

[4] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), Final Decision, 77 FCC 2d 384, *modified on recon.*, 84 FCC 2d 50 (1980), *modified on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, FCC 84-190 (released May 4, 1984).
[5] Complaint at para. 19.
[6] *Id.* at paras. 19-21.
[7] *See, e.g., id.* at paras. 6-7.

acknowledged that US Sprint's Virtual Private Network (VPN) service was favorably competitive *vis-a-vis* AT&T's SDN proposal, and would in fact save SCI $300,000. Yet US Sprint was told it would have to match AT&T's total package, including such equipment as free D-4 channel banks.[8] Finally, in a letter dated April 20, 1989, SCI informed US Sprint of its decision to switch to AT&T because of economic considerations.[9] SCI's later comments that service problems contributed to its decision to switch to AT&T were made, according to US Sprint, following US Sprint's statement to SCI that it considered AT&T's bundled offering unlawful and was considering whether to file a formal complaint.[10]

6. AT&T states that the offer of discounted CPE to SCI was not conditioned on the taking of SDN service.[11] Its offer of free D-4 channel banks, AT&T further notes, was made before a proposed SDN tariff filing became effective and was based on that filing becoming effective.[12] Since the filing was rejected, AT&T states that it informed SCI it would be unable to provide such free equipment.[13] Subsequently, according to AT&T, SCI chose another supplier for its D-4 channel banks.[14]

**2. Discussion**

7. In the *Computer II* proceeding, the Commission required that all CPE be detariffed and leased or sold separately from common carrier transmission services.[15] By disallowing the bundling of such equipment and services, the Commission sought to prevent uneconomic pricing and provide customers with greater flexibility in designing their own network packages. The Commission was further concerned that by continuing the practice of tariffing CPE and including it in the carrier's rate base, cross-subsidies might exist whereby customers not using carrier-provided equipment would subsidize those who did. In the same vein, the Commission reasoned, independent CPE vendors potentially would have faced unfair competition in the form of below-cost carrier-provided CPE.

8. Consistent with *Computer II* objectives, it would appear that SCI had a significant degree of flexibility in designing its own network packages. As evidence of this, it received three separate bids for the transmission service and multiple sources of supply were available for the various types of CPE. In fact, the CPE most integral to the transmission service, the D-4 channel banks, was ultimately obtained from another vendor, according to AT&T, and this is not refuted by complainant. US Sprint claims, nonetheless, that the very offer of free channel banks by AT&T convinced SCI to select AT&T's SDN service. US Sprint claims, in effect, that SCI was not aware that AT&T's tariff filing had to be allowed to go into effect before the free channel banks could be obtained.[16] The record in this case, however, does not support such a conclusion nor does it show that AT&T attempted to disguise the necessity for a tariff filing or otherwise mislead SCI into believing none was necessary.

9. With respect to PBX and computer equipment discounts offered or discussed in the course of sales activities by AT&T, there is insufficient evidence to show that such discounts represented a form of bundling. As noted, *supra*, the CPE market is highly competitive and the offering of discounts is a commonly used sales stimulus by most vendors. Such discounts are regularly made available to AT&T's CPE customers, and there is no indication that such discounts would be conditioned on SCI's purchase of transmission services. Thus, there is no probative basis in the record upon which to conclude that SCI was induced to subscribe to SDN in order to obtain CPE discounts not otherwise available. Without such evidence, unlawful bundling in violation of the *Computer II* rules cannot be said to exist.

**B. Tariff Requirement**

**1. Contentions of the Parties**

10. The question raised by complainant is whether AT&T, in its proposed provision of SDN service to SCI, violates Section 202(a) of the Act which, as noted, *supra*, prohibits discrimination with respect to like communications services and Section 203(c), which prohibits common carriers from making any charges which differ from effective tariff rates. According to US Sprint, AT&T, in the process of courting SCI's business, made quotations which were not in accordance with AT&T's then effective SDN tariff.[17] Specifically, US Sprint alleges that the rates to be paid by SCI for SDN service are below AT&T's tariffed rates in violation of Section 203(c) of the Act and because the rates available to SCI are not tariffed, such rates are not available to other SDN customers in violation of Section 202(a) of the Act.

11. AT&T states that its responsive proposal to SCI in competition with US Sprint and MCI Telecommunications Corporation stated on its face that SDN could be obtained only pursuant to the terms and conditions listed in AT&T's tariffs, or in revisions to such tariffs scheduled to become effective prior to implementation of service.[18] AT&T avers that all rates to be charged to SCI were to be strictly in accordance with its tariffs.[19]

**2. Discussion**

12. No evidence has been proffered to show that AT&T made any charges which were not in accordance with its then effective tariffs.[20] We note, however, that Section 203(c) also prohibits a carrier from engaging or participating in a communications service until tariff schedules are properly in effect. It is far from clear, however, that solicitation of business in advance of a tariff filing becoming

---

[8] *Id.* at para. 8.
[9] *Id.* at para. 14.
[10] *Id.* at para. 15.
[11] *See, e.g.*, Verified Answer of American Telephone and Telegraph Company (Answer) at paras. 28 and 37.
[12] *Id.* at para. 29.
[13] *Id.* at paras. 30 and 35 and p. 10 at n.*. *See* AT&T Communications Revisions to Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1568, 4 FCC Rcd 4984 (Com. Car. Bur. 1989).
[14] Answer at para. 35.
[15] *See also* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co., 102 FCC 2d 655 (1985), *modified in part on recon.*, 104 FCC 2d 739 (1986).
[16] Reply of US Sprint at p.4.
[17] Complaint at paras. 17-18.
[18] Answer at para. 25.
[19] *Id.* at para. 33.
[20] As of the date of the instant complaint, AT&T had not yet begun to provide SDN service to SCI.

effective, a common practice by carriers, should be viewed *per se* as a violation of this or any other provision of the Act or the Commission's rules. The prohibition, rather, is against the actual making or collection of charges which are not in accord with effective tariffs, a condition which has not been shown to exist here.

### C. Unlawful Rebates

#### 1. Contentions of the Parties

13. The question raised by complainant involves a possible violation of that portion of the Act, Section 203(c), which, as noted, *supra*, prohibits common carriers from refunding any portion of the applicable tariff charges. The essence of US Sprint's claim regarding unlawful rebates concerns the alleged effects of providing discounted or free equipment to SCI. US Sprint claims that these effective reductions in the prices for CPE constitute a means of remitting or refunding to the customer a portion of the tariff charges.[21]

14. AT&T counters that all discounts offered SCI were independently available and not tied to the purchase of SDN service.[22] The free channel banks, AT&T further notes, were never provided because of the failure of the enabling tariff filing to take effect.[23]

#### 2. Discussion

15. Our above findings with respect to the issue of bundling are equally applicable here. We find no additional evidence here upon which to conclude that AT&T's offer of free or discounted CPE constitutes an unlawful rebate or is otherwise in violation of the Act.

## IV. CONCLUSION

16. Based on an examination of the record and relevant issues, we find no basis on which to grant any of the relief sought by complainant. The evidence does not bear out complainant's contentions that AT&T has violated individually or severably Sections 202(a) or 203(c) of the Act or the Commission's *Computer II* rules with respect to its proposed provision of SDN service to SCI.

## V. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 206, 207, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 206, 207, and 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that US Sprint's complaint IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[21] Complaint at para. 19.
[22] Answer at para. 35.
[23] *Id.*

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

Buckeye Cablevision, Inc. CSR-3874-A
Lost Peninsula, Michigan

For Modification ofthe
Toledo, Ohio ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 25, 1993; Released: November 10, 1993**

By the Chief, Mass Media Bureau:

**INTRODUCTION**

1. Buckeye Cablevision, Inc. operator of a cable television system serving 120,000 subscribers in Toledo, Ohio and in communities in the surrounding Ohio counties of Lucas and Wood[1] has filed the captioned petition for special relief seeking to include the community of Lost Peninsula, Michigan within the Toledo, Ohio "area of dominant influence" for the purposes of the cable television mandatory broadcast signal carriage rules and to delete it from the Detroit, Michigan ADI to which it is currently assigned. A letter in support of this request was submitted with it from Margaret M. Dusseau, Supervisor, Erie Township, Michigan, along with a letter in support of it from the president of a local advertising company, Tom Hart. This request is unopposed.

**BACKGROUND**

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in Docket 92-259*[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such request, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

---

[1] These Ohio communities (in addition to Toledo and Lost Peninsula) are as follow: Perrysburg, Maumee, Sylvania, Ottawa Hills, Springfield, Rossford, Monclova, Oregon, Washington, Holland, Harbour View, Spencer, and Middleton.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 614(h)(l)(C) of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory signal carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a prepondance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii).

* * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in its *Report and Order in Docket 92-259*, 8 FCC Rcd at 2977, to aid decision making in these matters:

> For example, the historical carriage, of the stations could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

*Id.* at 2977 (emphasis in original).

6. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, it is obliged to carry the station from within the ADI whose city of license is closest to the principal headend of the cable system.[8] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up the channel capacity mandated for broadcast signal carriage, or may determine which of duplicating network affiliated stations are entitled to carriage priority. Alternatively, a station that is deleted from an ADI for signal carriage purposes loses the right to assert its must-carry rights in the specific communities.

## MARKET FACTS AND ARGUMENTS OF THE PARTIES

7. Lost Peninsula is in Erie Township in Monroe County, Michigan, which is located in the Detroit, Michigan ADI. Lost Peninsula is immediately to the northeast of Toledo.

8. In support of its petition, Buckeye states that it has approximately 38 subscribers in Lost Peninsula, where there are a total of only 64 homes. Buckeye describes the area as being about one mile wide at its base and approximately one mile in length. It also states that there is limited room for expansion and, although there has been occasional discussion of a condominium project in the past, none has been built. Furthermore, Buckeye claims that the fact that Lost Peninsula today is part of Michigan, rather than Ohio, is an historic anomaly resulting from the 1836 "Ohio-Michigan Boundary War" in which Congress took the City of Toledo from Southern Michigan and re-assigned it to Ohio, in return for permitting Michigan to acquire most of its current Upper Peninsula. This maneuver, however, left Lost Peninsula as a part of Michigan politically, even though it is nearly fifty miles from Detroit, and it is not directly accessible from Michigan without first passing through Ohio, because it is physically separated from the rest of Michigan by the Ottawa River and by Maumee Bay. This situation makes it impossible for Monroe Cablevision, Inc., the cable operator franchised to served Monroe County, to serve Lost Peninsula, even though the community is actually located in Monroe County.

9. Buckeye argues that this is truly a *de minimis* situation, and that the Commission has historically waived other regulations (such as its duopoly rules) in similar situations, Storer Communications, Inc., 59 RR 2d 611 (1985); *Family Television Corp.*, 59 RR 2d 1344 (1986); and *In re WPDZ(FM)*, 3 FCC Rcd 604 (1988). According to Buckeye, while the residents of Lost Peninsula do receive service from Michigan police and schools, all their other essential services (including water, sewer, and fire protection) are from Toledo, which is physically adjacent to Lost Peninsula. Toledo is also where Lost Peninsula residents generally shop or work, if they are not already retired (which approximately half of them are), and 70% of them subscribe to the Toledo newspaper. Buckeye adds that the Toledo stations have all been carried on the Lost Peninsula system since 1988, when cable service first began there, and it notes that all the commercial Toledo stations have been previously recognized by the Commission as being significantly viewed in Monroe County,[9] but that only four of the seven commercial stations serving Detroit have significantly

[7] H.R. Rep. 102-628, 102nd Cong., 2nd Sess. 97 (1992).
[8] *Report and Order in Docket 92-259*, 8 FCC Rcd at 2981.
[9] These stations are as follow: WTOL-TV (CBS, Channel 11), WTVG (NBC, Channel 13), WNWO-TV (ABC, Channel 24), and WUPW (Ind., Channel 36), all Toledo, Ohio.

viewed status in Monroe County.[10] Buckeye adds, however, that it presently carries four Detroit stations (WDIV, WJBK-TV, WKBD-TV, and WXYZ-TV), and that it plans to continue doing so if Commission rules permit it to do so.

10. At the same time, however, Buckeye explains that its configuration is a dual-cable system with basic service delivered on Channels 2-13, and that it cannot afford to spend approximately $750,000 to serve Lost Peninsula from a separate headend with its current 55-channel capacity and program line-up. Utilizing traps to delete five channels from the portion of its system serving Lost Peninsula and then inserting five stations from the Detroit ADI in their place would entail similar expenses, according to Buckeye, and therefore this option is also not feasible. Moreover Buckeye states that, since its system is already operating at maximum capacity, this approach would cause subscribers in Lost Peninsula to lose five channels of programming they currently receive. Finally, Buckeye states that for about $180,000 it could install five additional antennae (at $600 each), and five signal processors (for $1200 total), with the necessary fiber transmit and receive equipment for dual cable (2 pair at $15,000 each), along with the requisite labor and miscellaneous expenses to construct fiber optic and conversion electronics (about $24,500) on the tower at the hubsite serving Lost Peninsula. In view of the limited growth potential and the extremely small number of current subscribers in Lost Peninsula, however, Buckeye states that it could not justify this expense, even if it were not constrained by the Commission's new rate regulations from recouping its investment, nor can it justify incurring both the technical difficulties and the subscriber disruption that would result in the Ohio communities it serves if it were to simply carry all the stations in both ADIs entitled to assert mandatory carriage on-channel throughout its entire system. Therefore, Buckeye has concluded that, absent the requested waiver, it must terminate its service to Lost Peninsula.

11. In this instance, Buckeye has essentially asked that the Commission delete the community of Lost Peninsula, Michigan from the Detroit ADI and add it to the Toledo ADI. Thus, stations licensed to the Toledo ADI would be entitled to must-carry status in Lost Peninsula and Detroit ADI stations would no longer have this right in this community, although they may continue to be carried pursuant to retransmission consent agreements. Normally our decisions in ADI modification cases would be limited to particular stations, rather than to all stations in an ADI, since each station will exhibit unique factors. However in this instance, Buckeye has clearly demonstrated that the requested waiver deleting Lost Peninsula from the Detroit ADI and adding it to the Toledo ADI is warranted based upon its *de minimis* showing. When the Commission adopted its *Report and Order in MM Docket No. 92-259, supra*, it stated that §614(h)(1)(C) ". . . is intended to permit the modification of a station's market to reflect its individual situation. Therefore we do not want to restrict the types of evidence that parties can submit to demonstrate the propriety of changing a station's must-carry market" (footnote omitted). We believe this case demonstrates the wisdom of this approach. Lost Peninsula, Michigan with its 38 subscribers and small size, through a twist of history found its community separated from the Toledo, Ohio ADI. Indeed, Lost Peninsula cannot even be reached without first passing through Ohio, because it is physically separated from Michigan and the Detroit ADI by two bodies of water. Based upon the above, we find that Buckeye's requested waiver is in the public interest.

12. In view of the foregoing, we find that grant of Buckeye's petition to the extent indicated above is in the public interest.

13. Accordingly, IT IS ORDERED, pursuant to §614(c) of the Communications Act of 1934, as amended (47 U.S.C. 534) and §76.59 of the Commission's Rules (47 CFR §76.59), That the captioned petition for special relief filed June 5, 1993, by Buckeye Cablevision, Inc. IS GRANTED.

14. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.[11]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[10] Buckeye lists the following stations as significantly viewed in Monroe County: WDIV (NBC, Channel 4), WJBK-TV (CBS, Channel 2), WKBD-TV (Ind., Channel 50), and WXYZ-TV (ABC, Channel 7), all Detroit, Michigan. It also lists the following stations as not having significantly viewed status in Monroe County: WGPR-TV (Ind., Channel 62), and WXON (Ind., Ch. 20), both Detroit, Michigan, and WADL (Ind., Channel 38), Mount Clemens, Michigan.

[11] Pursuant to the *Report and Order in Docket 92-259*, 8 FCC Rcd 2978 n.150 (1993), the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in §614(h)(1)(C) of the Act.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

In re:

| | |
|---|---|
| Complaint of Central Missouri State University against Douglas Cable Communications | CSR-3923-M MO0827 |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 20, 1993; Released: November 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 13, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Corder, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the systems's principal headend at north latitude $93^{0}38'26"$ and west longitude $39^{0}05'54"$ and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal, but also order that the system carry it on channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Corder cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission*, Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

WSBT, Inc. CSR-3871-A
South Bend, Indiana

For Modification of Station
WSBT-TV's ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 25, 1993; Released: November 9, 1993**

By the Chief, Mass Media Bureau:

**INTRODUCTION**

1. WSBT, Inc. ("WSBT-TV"), licensee of Station WSBT-TV (CBS, Channel 22), South Bend, Indiana, has filed the captioned petition for special relief seeking to include the communities of Michigan City, the City of La Porte and all unincorporated areas in La Porte County, Indiana within the South Bend-Elkhart, Indiana "area of dominant influence" (ADI) for the purpose of the cable television mandatory broadcast signal carriage rules. This petition is unopposed, but Multimedia Cablevision, Inc. ("Multimedia"), operator of cable television systems in various Indiana communities, including La Porte County, filed a pleading supporting WSBT-TV's petition to the extent that the above communities are removed from the Chicago ADI if they are added to the South Bend - Elkhart ADI.

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992["Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in Docket 92-259*,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[3] An ADI is geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. Section 534(h)(1)(C)(ii).

* * * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

*Id.* at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis, rather than on a county-by-county basis, and that they should be treated as specific to particular stations, rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, simply provide the system operator with an expanded list of must-carry signals from which to choose *i.e.*, when it has used up the channel capacity mandated for broadcast signals carriage, or may determine which duplicating network affiliated stations are entitled to carriage priority.

**MARKET FACTS AND ARGUMENTS OF THE PARTIES**

8. The communities at issue herein are all in La Porte County, Indiana, which is in the Chicago, Illinois ADI. The South Bend - Elkhart, Indiana ADI consists of portions of two Michigan counties and eight Indiana counties, and the communities at issue are to the east, approximately thirty miles from South Bend.

9. According to WSBT-TV, the cable systems serving the above communities have carried it for years. U.S. Cable in Michigan City has carried WSBT-TV since 1981; Multimedia Cable, WSBT-TV has been carried by Michiana Cablevision since 1984. Furthermore, WSBT-TV states that the principal reason for its long history of carriage by the cable system serving the above communities in La Porte County has been its coverage of local events, combined with its service to these communities, including its sponsorship of a contest entitled "I Love to Read" involving six schools in the above communities (including two from Michigan City), which was intended to increase the number of books read by area students. In addition, WSBT-TV has assigned the only full-time reporter to cover these communities from any television station licensee either in South Bend or in Chicago. WSBT-TV states that, in addition to its extensive, and frequently exclusive, coverage of emergencies (including such things as flooding and school closings), it also broadcasts three or four in-depth stories each week concerning events in these communities during its noon, 5 PM, 6 PM and 10 PM news programs. WSBT-TV also includes scores and highlights from the high school teams in these communities as part of its daily sports coverage. During the past two years, WSBT-TV's coverage of events in these communities has included major stories, such as accidents and crime, in addition to other stories of purely local interest, such as tuberculosis cases in these communities, local unemployment and homelessness. WSBT-TV has also covered a pep rally, a new Juvenile Center, recycling in La Porte, a profile of the Mayor of the City of La Porte, local lottery winners, stories on the La Porte County Park Authority, special election night broadcasts, and a remote news broadcast in 1992

---

[6] H.R. Rep. 102-628, 102nd. Cong., 2nd Sess. 97 (1992).
[7] *Report and Order in Docket 92-259*, 8 FCC Rcd at 2977, 2977 n. 139.
[8] 47 C.F.R. Section 76.59.
[9] *Report and Order in Docket 92-259*, 8 FCC Rcd at 2981.

from the La Porte County Fair, which was sponsored by twelve La Porte County businesses. Similarly in 1991, WSBT-TV's remote broadcast from the boat show in Michigan City was sponsored by twenty-six Michigan City businesses.

10. In fact, WSBT-TV notes that five local cooperative automotive associations are among its regular advertisers, along with the La Porte County Fair, WLOI radio, and two local shopping malls. According to WSBT-TV, these businesses do not need to reach all the viewers in the Chicago ADI, nor do they wish to pay to do so, but if WSBT-TV does not have mandatory carriage rights in the above communities, local business may lose an important means of communicating to potential customers, and consumers will lose necessary information. In fact, WSBT-TV states that, as of June 1, 1993, several low power television stations owned by Dunes TV will commence live two-hour rebroadcasts of WSBT-TV's noon, early and late news programs from their sites at Portage, Gary, Valparaiso, and Chesterton. WSBT-TV notes that, while these communities in La Porte County begin only fifteen miles outside downtown South Bend, and are all within its Grade A contour (many of them are within its City Grade contour), they are forty miles away from Chicago's Loop. In addition, La Porte County is bordered on three sides by counties presently in the South Bend - Elkhart ADI (Starke, St. Joseph, and Berrien). Further, WSBT-TV asserts that stations in the Chicago ADI do not broadcast emergency flooding or weather reports affecting just La Porte County communities, nor do they feature local events and news of local interest, such as stories concerning the schools, except for sensational stories of widespread interest. In fact WSBT-TV maintains that when Chicago stations do air items from these communities, they either borrow WSBT-TV's satellite truck or they rely directly on its news feeds. WSBT-TV also notes that while there are some 3,023,600 households in Chicago's ADI, there are only 2,985,000 households in the South Bend - Elkhart ADI, so this relative lack of attention to local issues is not surprising.

11. WSBT-TV claims that it is logical, therefore, to also find that it had the largest overall station share (16%) in La Porte County between May 1992 and February 1993 for cable and noncable homes, according to Arbitron's *Indiana Television County Coverage Study*, p. 109. the next closest station was WLS-TV (ABC, Channel 7), Chicago, Illinois with 14%. The station with the third highest rating (10%) was WNDU-TV (NBC, Channel 16), South Bend, Indiana, while WBBM-TV (CBS, Channel 2), Chicago, Illinois, received only a 6% share (in noncable homes, it had a 7% share, while WSBT-TV had a 16% share (with a 21% share in La Porte County's noncable homes). Finally, WSBT-TV claims that the submission of county-wide data is appropriate, in this instance, because the communities specified above comprise all of the political subdivisions within La Porte County.

12. According to Multimedia, it has carried WSBT-TV since 1984, and the station's Grade A contour covers all the principal communities in La Porte County, which is only fifteen miles from downtown South Bend (by comparison to Chicago, which is forty miles away). Multimedia adds that WSBT's ratings clearly demonstrate that it is more heavily viewed in La Porte County than is the Chicago CBS affiliate, and it states that the Commission should add the communities at issue to the South Bend-Elkhart ADI, but remove them from the Chicago ADI.

## ANALYSIS AND DECISION

13. We will grant WSBT-TV's petition. We first note that WSBT-TV has demonstrated a long history of carriage on the cable systems serving the above communities (first factor). In addition, WSBT-TV has shown Grade A coverage to the City of La Porte, Michigan City, and the other unincorporated areas of La Porte County, as well as programming service to these communities (second factor). WSBT-TV has further demonstrated a historic lack of coverage of local events, sports or news in these communities by other stations presently eligible to assert mandatory carriage rights on cable systems serving these communities (third factor), and the available evidence of cable and noncable household viewing patterns for La Porte County indicates wide-spread viewership of WSBT-TV (fourth factor).[10] Therefore, for purposes of determining mandatory signal carriage obligations, we shall consider the City of La Porte, Michigan City, and all unincorporated areas in La Porte County, Indiana to be part of the South Bend - Elkhart, Indiana ADI with respect to Station WSBT-TV. However, no showing has been made to justify deleting these communities from the Chicago, Illinois ADI; therefore, they will also remain in that ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* para. 7 *supra*.

---

[10] We recognize that these data are county-based rather than community-specific. Absent evidence that such data are not fairly reflect of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive, in cases of this type. In addition, we note that the general preference for WSBT-TV among La Porte County viewers is fairly clear according to Arbitron's survey *Television County Coverage: Indiana* (Cable Controlled Counties, 1992):

| | Noncable Households | | Cable Households | |
|---|---|---|---|---|
| | Net weekly share | Net weekly Circulation | Share | Circulation |
| WSBT-TV | 21 | 68 | 12 | 62 |
| WBBM-TV | 7 | 40 | 5 | 59 |
| WMAQ (Ind., Ch. 5) Chicago, Illinois | 8 | 47 | 8 | 69 |
| WLS-TV | 11 | 44 | 16 | 80 |
| WGN (Ind., Ch. 9) Chicago, Illinois | 8 | 61 | 6 | 60 |
| WFLD (Ind., Ch. 32) Chicago, Illinois | 7 | 61 | 5 | 7 |
| WPWR (Ind., Ch. 50) Aurora, Illinois | 2 | 26 | 3 | 38 |
| WGBO-TV (Ind., Ch. 66) Joilet, Illinois | - | - | 2 | 20 |
| WCIU-TV (Ind., Ch. 26) Chicago, Illinois | - | 2 | - | - |

**ORDER**

14. In view of the foregoing, we find that grant of WSBT-TV's petition to the extent indicated above is in the public interest.

15. Accordingly, IT IS ORDERED, pursuant to Section 614(C) of the Communications Act of 1934, as amended (47 U.S.C. 534) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), That the captioned petition for special relief filed June 5, 1993 by WSBT, Inc IS GRANTED. This change shall be effective in accordance with the following schedule: WSBT-TV shall notify the cable systems in question in writing of its carriage and channel position elections (Sections 76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

16. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by Section 0.283 of the Commission's Rules.[11]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[11] Pursuant to the *Report and Order in Docket 92-259*, 8 FCC Rcd at 2978 n.150, the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in Section 614(h)(1)(C) of the Act.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Communication Technical Services, Inc. — File No. I-T-C-93-225

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as an international resale carrier

**ORDER AND CERTIFICATE**

**Adopted: October 28, 1993; Released: November 9, 1993**

By the Chief, International Facilities Division:

1. The above-captioned application filed by Communications Technical Services, Inc. (CTS) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell international switched services between the United States and various international points and international private lines for the provision of switched services between the United States and Canada only.[1]

2. The application was placed on public notice on June 16, 1993. Subsequently, AT&T filed a petition to deny, in response to which CTS filed an opposition.

3. AT&T's petition addresses two issues. First, AT&T argues that Canada does not afford equivalent resale opportunities and, second, urges the Commission to impose additional reporting requirements on CTS.[2] In the *fONOROLA Corporation and EMI Communications Corporation Order* (*fONOROLA/EMI Order*)[3] the Commission found that Canada affords equivalent resale opportunities. As a result, resale of international private lines for switched services and of interconnected international private line services between the United States and Canada is permitted subject to appropriate authorization.[4] However, subsequent to the Commission's equivalency determination, AT&T filed a petition for reconsideration of the *fONOROLA/EMI Order* in which it raised the same issues that it raises here. Specifically, AT&T argues that Canada does not afford equivalent resale opportunities and that the Commission should adopt the monthly reporting requirements for all private line resellers. We will address these issues in the context of the petition for reconsideration of the *fONOROLA/EMI Order*. We, therefore, grant this authorization subject to possible modification or revocation based on the outcome of that pending petition for reconsideration.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-93-225 IS GRANTED and CTS is authorized to resell international private lines for the provision of switched services between Canada and the United States only--that is, private lines which carry traffic that originates in the United States and terminates in Canada or traffic that originates in Canada and terminates in the United States.[5]

5. IT IS FURTHER ORDERED that CTS is authorized to lease from appropriately authorized carriers and operate up to 40 DS-1 circuits for the provision of switched services between the United States and Canada only.

6. IT IS FURTHER ORDERED that CTS is authorized to resell international switched services as set forth in AT&T Tariffs F.C.C. Nos. 1, 2, 9, 11, and 12; ATC Long Distance Tariff F.C.C. No. 2; Cable & Wireless Tariff F.C.C. No. 3; EMI Communications Corporation Tariff F.C.C. No. 14; fONOROLA Tariff F.C.C. No. 1; LDDS Communications Inc. Tariff F.C.C. No. 1; Litel Telecommunications Inc. Tariff F.C.C. No. 1; MCI Telecommunications Corp. (MCI) Tariffs F.C.C. Nos. 1 and 2; MCI Overseas Telecommunications Inc. Tariffs F.C.C. Nos. 1 and 2; MCI/Western Union Tariff F.C.C. 20 and 27; Mid Atlantic Telecommunications Inc. Tariff F.C.C. No. 1; US Sprint Telecommunications Tariffs F.C.C. Nos. 1, 2, 5 and 7; TRT/FTC Communications Inc. Tariff F.C.C. No. 15; U.S. Long Distance Inc. Tariff F.C.C. No. 1; and WilTel Inc. Tariff F.C.C. No. 2 to provide switched services between the U.S. and international points listed in those tariffs.[6]

---

[1] CTS intends to provide voice and data services.

[2] Specifically, AT&T urges the Commission to adopt monthly reporting requirements for private line resellers and a "zero tolerance" test. This test would require the Commission to suspend immediately the private line resale authorizations between the United States and Canada if for three consecutive months the traffic reports demonstrate an increase in US outpayments attributable to more southbound than northbound minutes diverted to international private lines.

[3] *See fONOROLA/EMI Order*, 7 FCC Rcd 7312 (1992), *petition for recon. pending.*

[4] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale, did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, *First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlement process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates, CC Docket 90-337, Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992)).

[5] The Commission restricts the use of international private lines between the United States and Canada to the carriage of United States-Canada traffic only. (*See fONOROLA/EMI Order*, at paras. 15 and 22.)

[6] On August 26, 1993, CTS modified its application by deleting Western TEL-Communications, Inc. from the list of underlying

7. IT IS FURTHER ORDERED that neither CTS nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CTS or any such persons or companies controlling or controlled by CTS are parties.

8. IT IS FURTHER ORDERED that CTS shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that CTS shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that CTS shall file semi-annual reports of circuit additions to Canada, pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. §63.15.

11. IT IS FURTHER ORDERED that CTS shall file with the Commission a copy of any operating agreement entered into with its foreign correspondents in Canada within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

12. IT IS FURTHER ORDERED that CTS shall file all arrangements entered into with other carriers for the interconnection of private lines to the U.S. public switched network, pursuant to Section 43.51(a) of the Commission's Rules, 47 C.F.R. §43.51(a).

13. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice, fONOROLA/EMI Order (recon. pending)*, and any related proceedings.

14. IT IS FURTHER ORDERED that grant of this authorization to resell international private lines for the provision of switched services between the United States and Canada is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

15. IT IS FURTHER ORDERED that AT&T's petition to deny is deferred for consideration in the *fONOROLA/EMI Order*.

16. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services which CTS seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

17. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

---

carriers whose services CTS was seeking authority to resell. (*See* Letter, dated August 26, 1993, from Margaret M. Charles, Counsel, Communications Technical Services, to Jennifer Warren, International Facilities Division, Common Carrier Bureau.)

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

In re:

| | |
|---|---|
| Complaint of Greater Dayton | CSR-3936-M |
| Public Television against | IN0067 |
| TCI Cablevision of Indiana, Inc. | |

Request for Carriage

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 20, 1993; Released: November 9, 1993**

By the Chief, Mass Media Bureau:

1. On July 19, 1993, a petition on behalf of Greater Dayton Public Television, licensee of Television Broadcast Station WPTO (Educ., Ch. 14), Oxford, Ohio, was filed with the Commission claiming that TCI Cablevision of Indiana, Inc. ("TCI"), operator of a cable television system serving New Castle, Indiana, had declined to carry the station, even though Oxford is within fifty miles of the system's principal headend at north latitude $39^0$ 56' 49" and west longitude $85^0$ 21' 16" and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTO requests that the Commission not only order TCI to carry its signal, but also order that the system carry it on channel 14, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. WPTO's petition establishes that it is entitled to carriage on the New Castle cable system, and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint" filed July 19, 1993, by Greater Dayton Public Television IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Indiana, Inc. IS ORDERED to commence carriage of WPTO on cable channel 14 forty-six (46) days from the release date of this *Order*. This action is taken by the Chief, Mass Media Bureau, pursuant to authority delegated by §0.283 of the Commission's Rules.

[1] On April 8, 1993, the United States District Court of the District of Columbia issued a decision in the litigation involving *Turner Broadcasting System, Inc., et al., v. Federal Communications Commission,* Civil Action No. 92-2247 (D.D.C. April 8, 1993), which upheld the provisions of the 1992 Cable Act that had been challenged as violating plaintiffs' constitutional rights and terminated the 120 day *Standstill Order* previously issued in this case.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

Western New York Communications
Buffalo, New York

NAL 215BF0009

**ORDER**

**Adopted: November 2, 1993; Released: November 9, 1993**

By the Field Operations Bureau:

## I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Western New York Communications (Western or Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 16, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302(b) (the Act). As explained below, we are cancelling the monetary forfeiture penalty.

## II. BACKGROUND

2. Our records show that on January 28, 1992, an FCC inspector visited Western in Buffalo, New York. He observed a "generic" computer that had no FCC label nor any label showing make or model. There was no evidence presented that the computer had been certified as required by Section 15.101 of the Commission's Rules, 47 C.F.R. § 15.101.

3. On June 23, 1992, the Buffalo Office issued Western a Notice of Apparent Liability (NAL) for violating Section 302(b) of the Communications Act and Section 2.803 of the FCC's Rules by marketing a computer that had not been authorized by the FCC. 47 U.S.C. § 302(b), 47 C.F.R. § 2.803. Western responded to the NAL on July 1, 1992. Upon review of the response, the Buffalo Office issued Western a Forfeiture Order for $7,000 on July 16, 1992.

4. Western states several reasons why it should not be subject to a monetary forfeiture penalty. Western complains that on page 2 of the NAL a company other than itself is listed as the NAL subject. Western further complains that the Forfeiture Order includes descriptions of violative equipment not listed in the original NAL.

## III. DISCUSSION AND CONCLUSION

5. We find merit to the arguments presented. The NAL that was issued to Petitioner was properly captioned, and was, in fact mailed to Western. Several ordering clauses, however, including one directing where the Notice should be mailed to, incorrectly listed another company name and address. Further, Petitioner is correct in asserting that the NAL only generally referred to the "generic computer" Petitioner is alleged to have sold, and only later, is a different computer specified as the illegal equipment Petitioner is alleged to have sold.

6. Section 1.80(f), 47 C.F.R. § 1.80(f), of the Rules establishes the minimum necessary information which must be provided in the NAL to provide sufficient notice. We think the NAL failed to meet this requirement.

## IV. CONCLUSION

7. For the reasons stated above, we are cancelling the finding of liability for monetary forfeiture in the amount of $7,000.

## V. ORDERING CLAUSES

8. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by Western is *GRANTED*. 47 C.F.R. § 1.106.

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return-receipt requested, to Western New York Communications, 202 Allen Street, Buffalo, New York 14201.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 3, 1993**

**Released: November 9, 1993**

Timothy N. Rinn
2404 Lisa Ln
Bellingham, WA 98226

Re:
NAL/Acct. 215FE0069

Dear Mr. Rinn:

This responds to your August 6, 1992 letter requesting higher level review and/or reconsideration of the forfeiture issued to you under NAL/ACCT No. 215FE0069. The initial Notice of Apparent Liability was issued in the amount of $2,000. Pursuant to your initial response, and taking into consideration that it was a first offense and a relatively minor violation, the subsequent Notice of Forfeiture was issued in the reduced amount of $500.

Our review indicates that the amount of forfeiture should be $100.

Your August 6 letter presents no new information that was not previously considered in setting the reduced amount of the forfeiture. You contend that the use of your unlicensed radio to place a telephone call from your boat was not done specifically for the purpose of violating the Commission's regulations. This is not a valid justification for failure to obtain a license for the radio station aboard your boat.

We note that you identified the transmissions made from your unlicensed station by a call sign that had been issued to a former owner of your boat the license for which apparently had been cancelled (as it should have been) when the boat was sold. Thus the transmissions were identified by a call sign that had not been issued to you by the Commission and would have been in violation of Section 80.102 of the Commission's Rules if the station had been properly licensed at the time. As a result of this improper identification of your unlicensed operations, it was necessary for our staff to expend considerable resources to fully identify your unlicensed station as the source of the transmissions.

The Commission regards failure to comply with its requirements for the licensing of radio stations as a serious matter. Claims that the user was unaware of the licensing requirements or claims that the user had relied on the services of others to secure compliance with the licensing requirements do not justify mitigation of penalties. In addition, compliance with the licensing requirement after the unlicensed condition has been brought to the user's attention does not justify mitigation.

The fact that your unlicensed operation was a single event that was not repeated, and the fact that there is no prior record of your operation of unlicensed stations have already been taken into consideration when the amount of the forfeiture was adjusted downward from $2,000 to $500. The Commission has, however, reconsidered and reduced the usual amount of forfeiture for this kind of violation.

Therefore, you are ORDERED to pay a forfeiture of $100. Payment should be by check or similar instrument payable to the Federal Communications Commission. To assure proper credit for the remittance, place the NAL/Acct. No. 215FE0069 on the remittance and mail it to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re

| | |
|---|---|
| Private Coast | NAL/Acct. No. 315AN0025 |
| Station KXP96 | NAL/Acct. No. 315AN0016 |
| and Maritime Mobile | |
| Station WAD7029 | |
| Joe Harlan | |
| Kodiak, AK | |

**ORDER**

**Adopted: November 2, 19938; Released: November 9, 1993**

By the Chief, Field Operations Bureau:

## I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Joseph W. Harlan (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, requesting reconsideration of the Bureau's December 10, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $2,000 (NAL Acct. No. 315AN0016). In a separate matter also dated December 10, 1992, the Anchorage Office issued a forfeiture against station KXP96, also licensed to Joseph W. Harlan (NAL Acct. No. 315AN0025). The other radio was operated by Mary Ellen Harlan. Petitioner requests reconsideration of the forfeiture orders. As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount for these forfeitures is $2,000 for NAL #315AN0016, and $2,000 for NAL #315AN0025.

## II. BACKGROUND

3. On the dates of August 26, 28, 31, and September 4, 1992, Petitioner was observed on the frequency 4143.6 kHz by engineers from the FCC's Anchorage Office. The stations were KXP96, operated by Mary Ellen Harlan, and WAD7029, operated by Joseph Harlan. Joe Harlan is the licensee on both stations. The frequency 4143.6 kHz is not authorized for use by stations in the Maritime Service. This constitutes a violation of Section 301 of the Communications Act of 1934.

4. Petitioner was issued two Notices of Forfeiture on December 10, 1992. Petitioner requested reconsideration in a letter dated January 19, 1993. In his Petition for Reconsideration, Petitioner states that the fine issued to him is prohibitive and unduly punitive. Petitioner also argues that it is inappropriate to impose the maximum fine to a first-time offender. Petitioner further states that issuance of a forfeiture against both stations participating in the transmission constitutes double jeopardy.

## III. DISCUSSION

5. The two stations in question are separately licensed and operated. Although Petitioner argues he should not receive fines for both stations, the licensee is ultimately responsible for each and all of his transmitters and the transmissions made on them. As such, operation of each station on an unauthorized frequency constitutes a separate violation by each station participating, and is not considered a single violation. While Petitioner also claims this constitutes double jeopardy, we again note that the transmissions involved two independent acts, each of which constitutes a separate violation. Furthermore, the concept of double jeopardy is applicable only to criminal proceedings, not civil administrative procedures such as the monetary forfeiture process.

6. With regard to the amount of the fine levied, we do not find the fine to be unduly punitive. Operators in the maritime frequency are expected to observe the rules under which they are licensed. Operation outside the maritime band carries the potential for significant interference to other services. According to the Commission's *Policy Statement*, the penalty for operation on an unauthorized frequency is $8,000 per violation. *See Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993). Because Petitioner is an individual rather than a corporation, and because the Commission has no record of prior violations, each fine was reduced to $2,000.

## IV. CONCLUSION

7. For the aforementioned reasons, we are adjusting the fines imposed to the combined amount of $4,000. No further adjustments appear warranted.

## V. ORDERING CLAUSES

8. IT IS ORDERED that Joseph Harlan shall submit the $4,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be made by check or money order payable to the Federal Communications Commission. Please place NAL numbers 315AN0025 and 315AN0016 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

9. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Joseph Harlan, 838 Sargent Cr. Rd., Kodiak, Alaska, 99615, and to Gregory P. Razo, Gray, Geveden, Cole & Razo, 326 Center Avenue, Suite 203, Kodiak, Alaska, 99615.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**November 2, 1993**

**Released: November 9, 1993**

Richard V. Chiabai
1486 Entner Lane
Anacortes, WA 98221

Dear Mr. Chiabai:

This is in response to your letter dated December 4, 1992, requesting higher level review of the Notice of Forfeiture bearing the account number 315FE0005. This forfeiture was issued for engaging in intership voice communications on marine channel 70 which is reserved for digital selective calling.

Over seven years ago marine channel 70, 156.525 MHz, was withdrawn from the group of channels allowed for noncommercial intership voice communications and reserved for safety and distress calling by means of digital selective calling (DSC). DSC is a technique for ship-to-shore and ship-to-ship calling by means of very brief sequences of digital codes. Receivers in the system are designed to respond only to one or more particular digital codes. This results in a system of calling similar to a land telephone whereby only a particular one or limited group of receivers are activated by a particular digital code. For the system to be effective, the particular frequency used for DSC must be kept free of interference. The system will not function properly on a channel that is simultaneously being used for voice communications. Since the system of digital selective calling is intended to permit rapid alerting of other vessels and shore stations in event of an emergency, keeping the frequency clear of all interference is vital to the safety of vessels in the area. When the frequency is used for voice communications, the digital calling system cannot be used effectively. Thus, using the channel reserved for DSC distress and safety calling for voice communications jeopardizes the safety of all vessels in the area.

We note that in addition to operating with voice communications on a channel reserved for DSC, you also failed to identify your station by its assigned call sign in violation of Section 80.102(a) of the Commission's Rules. We are unable to determine from a review of the intercepted communications whether the failure to identify was a deliberate attempt to conceal the identity of the station while using an unauthorized frequency or merely the result of forgetfulness on the part of the operator. Nevertheless, the fact remains that the communications were not properly identified as required.

The Commission has recently reviewed and revised its standards for assessment of forfeitures for these types of violations. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released: August 12, 1993). Based on these new standards and the fact that there is no record of prior violations of this type on your part, and taking into consideration your claim that you were unaware of the prohibition against use of marine channel 70 for voice communications, we are cancelling the forfeiture. However, the record of these violations is being retained in Commission files. In the event of any future violations on your part of a similar type, this record will be considered in determining whatever future penalty might be appropriate.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

DIRECT BROADCASTING SATELLITE CORPORATION — File No. DBS-88-08

For Assignment of Direct Broadcast Satellite Orbital Positions and Channels

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 3, 1993; Released: November 10, 1993**

By the Chief, Video Services Division:

1. On August 15, 1989, the Commission granted the application of Direct Broadcasting Satellite Corporation ("DBSC"), for authority to construct a Direct Broadcast Satellite ("DBS") system, conditioned on DBSC's "due diligence" in the construction of its system. *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6300-01 (1989) ("*Continental*"). The due diligence requirement, which is set forth in Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), provides, *inter alia*, that a DBS permittee must begin construction or complete contracting for the construction of its satellite(s) within one year of the grant of its construction permit. Under the policy established by the Commission in *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250, 253 (1983), particular orbital positions and channels are not assigned to a DBS permittee unless and until it demonstrates that it has fulfilled this component of the due diligence requirement. Now under consideration are documents and information submitted by DBSC to demonstrate that it has completed contracting for the construction of its satellites, thereby complying with the first component of the due diligence requirement; and a request from DBSC for the assignment of particular orbital positions and channels.

2. In *Continental, supra*, the Commission determined that, in the interest of spectrum efficiency and in light of the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83"),[1] "half-CONUS" signals[2] would be allocated only in east/west pairs, with eastern half-CONUS service permitted only from the four DBS orbital positions farthest east ($61.5^0$W, $101^0$W, $110^0$W, and $119^0$W, referred to as "eastern orbital positions"); and western half-CONUS service permitted only from the four DBS orbital positions farthest west ($148^0$W, $157^0$W, $166^0$W, and $175^0$W, referred to as "western orbital positions"). *Id.* at 6293. Accordingly, DBSC was authorized to construct a DBS system consisting of (a) two or more satellites delivering eleven (11) half-CONUS channels to each half of the continental United States, or (b) one or more satellites delivering eleven (11) full-CONUS channels to the entire continental United States. *Id.* at 6300-01.[3]

3. On April 3, 1990, DBSC filed a letter with the Commission stating that it had entered into a contract with General Electric Company, Astro-Space Division ("GE Astro"), for the construction of two 16-channel DBS satellites, and that the first payment to GE Astro under the contract had been made. DBSC stated that the contract demonstrates compliance with the first aspect of the due diligence requirement of Section 100.19(b) of the Commission's Rules. Attached to DBSC's April 3, 1990 letter are portions of its contract with GE Astro. These contract portions contain, among other information, provision for the construction of two satellites, with an option for up to three more; a detailed description of the design characteristics and specifications of the satellites to be built; a payment schedule; a list of construction progress milestones; and a signature page bearing the signatures of Mr. Harley W. Radin, chairman and chief executive of DBSC, and Dr. L. R. Greenwood, division vice president and general manager of GE's Astro-Space Division.

4. On April 29, 1992, DBSC filed an amendment to its due diligence showing based upon an amendment to its satellite construction contract with GE Astro. Attached to DBSC's April 29, 1992 filing are portions of the amendment to its satellite construction contract with GE Astro, and other documents concerning that amendment, including (i) a revised construction milestone schedule; (ii) statements from Mr. Radin of DBSC and Mr. J. T. Lettiere, manager of commercial communication programs contracts for GE's Astro-Space Division, verifying the existence of the contract, as amended, and the accuracy of the information regarding that contract, as amended, which has been submitted to the Commission; (iii) a "Summary Report of Program Milestones and Progress"; and (iv) technical appendices to the amended contract containing a detailed description of the design characteristics and specifications of the satellites to be built. The Summary Report of Program Milestones and Progress indicates that the first three milestones specified in the original construction milestone schedule submitted on March 21, 1990 had been accomplished ahead of schedule, and that the first three payments specified in the original payment schedule had been made ahead of schedule. Further, although the Summary Report states that certain construction milestones relating to system design could not yet be met because specific orbital

---

[1] The essential provisions of the RARC-83 agreements were incorporated into Appendix 30 (Orb 85) and Appendix 30A (Orb 88) of the International Telecommunications Union (ITU) Radio Regulations, as modified at the World Administrative Radio Conferences in 1985 and 1988. *See* para. 11, *infra*.

[2] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[3] The four eastern orbital positions, $61.5^0$W, $101^0$W, $110^0$W and $119^0$W, may be technically suitable for delivering DBS service to any part of the continental United States. *Id.* at 6293-94. Western service, as a component of a full-CONUS signal, was authorized from eastern orbital positions, under the condition that any such authorization may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan. *Id.* at 6294.

positions and channels had not yet been assigned, it lists numerous other activities and efforts on the part of DBSC and GE Astro to advance the design and construction of the satellites called for in the contract. On May 11, 1992, DBSC filed a copy of a letter from Mr. Lettiere of GE Astro indicating that DBSC had made the first payment due under the contract amendment (the fourth payment overall).

5. On June 10, 1993, DBSC reported that GE Astro had merged with Martin Marietta Astro Space Corporation ("Martin Marietta"); that its satellite construction contract with GE Astro therefore had been assigned to Martin Marietta; and that the contract had been amended to extend the spacecraft delivery dates and payment schedule dates. In addition, DBSC reported that the fifth scheduled payment under the contract, as amended, had been made in January, 1993. Attached to DBSC's June 10, 1993 filing are, *inter alia*, (i) portions of the amendment to DBSC's satellite construction contract, including a revised payment schedule; (ii) a letter from Mr. H. T. Riley, manager of commercial contracts for Martin Marietta, verifying that Martin Marietta "has fully assumed all of the obligations of and is bound by the terms of" DBSC's satellite construction contract with GE Astro, and verifying the accuracy of the information regarding that contract, as amended, which has been submitted to the Commission; and (iii) a revised construction milestone schedule. On August 6, 1993, DBSC filed a revised payment schedule. In a letter filed October 18, 1993, DBSC requests even-numbered channels 2-22 at orbital positions 61.5$^0$W and 175$^0$W.

## DISCUSSION

6. In *Tempo Enterprises, Inc.*, 1 FCC Rcd 20 (1986) (*"Tempo"*), the Commission summarized the basic foundation for demonstrating compliance with the first component of the due diligence requirement:

> There is a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites. The essential terms of the contract are verified by the submission of relevant portions of the document or by the principal's sworn statement as to contents, verified by...[the satellite construction contractor]. Specific satellites and their design characteristics are identified, and dates for the start and completion of construction are specified. The payment terms and schedule are described sufficiently to demonstrate the parties' investment/commitment to completion of the system.

*Id.* at 21. In *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858 (1988)(*"USSB"*), the Commission clarified the contractual details which must be provided to demonstrate due diligence. The contracts or contract descriptions must include "regular[,] specific construction progress milestones in the construction timetable", *id.* at 6861, and "payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process." *Id.* at 6862 n.20.

7. An analysis of DBSC's payment schedule, as revised, reveals that, with the exception of the first three payments, which DBSC made between April and October, 1990, payments are to be made on specified dates over a period of 74 months, from April 30, 1992, to June 30, 1998. According to that schedule, by May 31, 1995, approximately one-third of the way through the payment period and two and one-third years before delivery of the first spacecraft, DBSC shall have paid to Martin Marietta 46.379% of the total contract price. By May 31, 1996, halfway through the payment period and one and one-third years before delivery of the first spacecraft, DBSC shall have paid to Martin Marietta 85.654% of the total contract price. By September 30, 1997, when delivery of the first spacecraft is scheduled, DBSC shall have paid to Martin Marietta 97.720% of the total contract price. By March 31, 1998, when delivery of the second spacecraft is scheduled, DBSC shall have paid to Martin Marietta 99.828% of the total contract price. Under this payment schedule, "the initial payments are significant, and the majority of payments are due during the middle phases, well before the end of the construction period." *Tempo*, 1 FCC Rcd at 21. Further, as indicated above, DBSC has made the first five payments under the contract, as amended, in a timely manner. Thus, it appears that DBSC clearly has made, and will continue to make, a financial commitment to the construction of the satellite. *USSB*, 3 FCC Rcd at 6862 n.20. Accordingly, DBSC's payment schedule is sufficient to satisfy the due diligence requirements established by the Commission.

8. As stated above, the Summary Report of Program Milestones and Progress submitted with DBSC's April 29, 1992 filing indicates that the first three milestones specified in DBSC's original construction milestone schedule had been accomplished ahead of schedule. In the amended construction milestone schedule submitted with its June 10, 1993 amendment, DBSC states that "Program Reviews" will be conducted "Quarterly or as needed", and lists 19 additional construction milestones to be achieved on specified dates over a period of 44 months, from September 1994, to May, 1998, including the launch of spacecraft in November, 1997, and May, 1998.

9. The essential terms of the contract between DBSC and Martin Marietta have been described in DBSC's various submissions to the Commission, and verified by the submission of the relevant portions of the document. That contract identifies specific satellites and design characteristics, and contains no unresolved contingencies. We believe that DBSC's payment schedule, its construction milestone schedule, and its efforts to adhere to that construction schedule, are clearly sufficient to "demonstrate...[its] investment/commitment to completion of the system." *Tempo*, 1 FCC Rcd at 21. Accordingly, we find that DBSC's satellite construction contract with Martin Marietta, including the payment schedule and construction milestone schedule, as amended, are sufficient to demonstrate due diligence and justify the assignment of specific orbital positions and frequencies.[4]

---

[4] DBSC's construction permit application was granted on August 15, 1989. *Continental*, 4 FCC Rcd at 6300. Accordingly, pursuant to Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), DBSC's DBS system would be required to be

10. The orbital positions and channels requested by DBSC at 61.5$^0$W and 175$^0$W are available. Accordingly, DBSC will be authorized to provide eleven channels of eastern half-CONUS or full-CONUS DBS service on even-numbered channels 2-22 at orbital position 61.5$^0$W, on the condition that such authorization for full-CONUS service may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements. For its western channel allocation, DBSC will be authorized to provide eleven channels of western half-CONUS DBS service on even-numbered channels 2-22 at orbital position 175$^0$W.

11. *Additional Technical Information.* In order to issue a revised construction permit and insure that international coordination is initiated in a timely fashion, DBSC is directed to supply, within thirty (30) days of the release of this Order, updated technical information for its proposed satellites. This information should include the "Basic Characteristics to be Furnished in Notices Relating to Space Stations in the Broadcasting - Satellite Service," contained in Annex 2 of Appendix 30 (Orb 85) of the ITU Radio Regulations. Appropriate calculations should be supplied to demonstrate compliance with paragraphs 1 through 8 of Annex 1 of Appendix 30 (Orb 85), as applicable. Particular attention should be paid to shaped beam contours to ensure that they are of sufficient detail to permit verification of all necessary calculations. As a guideline, see paragraph 12(h) of Annex 2. Finally, DBSC should provide a detailed description of any technical characteristics to be utilized which differ from those assumed for international planning purposes, *e.g.*, the use of 26 MHz channel bandwidth. In this regard, DBSC should provide an analysis demonstrating that the proposed technical characteristics would not cause more interference or require more protection than the assumptions used for planning purposes. The Commission may, upon further analysis, impose whatever conditions or limitations it determines to be necessary in order to ensure compliance with applicable international provisions when the cumulative effects of various proposals are considered. This is particularly so with regard to multi-operator use of full-CONUS service beams from the four easternmost orbital positions. This additional technical information should be submitted with a request for the issuance of a construction permit and launch authority, accompanied by the appropriate filing fee specified in Section 1.1104(10)(a)(ii) of the Commission's rules, 47 C.F.R. §1.1104(10)(a)(ii).

12. Accordingly, IT IS ORDERED, That Direct Broadcasting Satellite Corporation is authorized to provide eleven channels of eastern half-CONUS service, or eleven channels of full-CONUS DBS service, on even-numbered channels 2-22 at orbital position 61.5$^0$W; and eleven channels of western half-CONUS service on even-numbered chanels 2-22 at orbital position 175$^0$W. This assignment of channels is made on the conditions (a) that DBSC submit, within thirty (30) days of the release of this Order, the updated technical information described in paragraph 11 of this Order; and (b) that DBSC's authorization may be modified or rescinded if analysis of updated technical information indicates that such service would violate the interference parameters of the Region 2 Plan, or other international treaties or agreements. This assignment of orbital positions and channels does not include launch and/or operational authority for any phase of DBSC's proposed DBS service. Upon submission of the updated technical information described in paragraph 11 of this Order, and a finding that such information is sufficient to establish compliance with international treaties and agreements, an instrument of authorization, including launch authority, as requested, will be issued.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

in operation by August 15, 1995. According to the construction milestone schedule submitted with DBSC's initial due diligence showing, filed April 3, 1990, its first satellite was scheduled to be launched in October, 1994, and its second satellite was scheduled to be launched in April, 1995, within the time period required by the rules. In its revised construction milestone schedule, filed June 10, 1993, DBSC indicates that its first satellite is scheduled to be launched in November, 1997, and its second satellite is scheduled to be launched in May, 1998, both dates being after the date required by the rules. However, Section 100.19(b) contemplates granting extensions of time "upon proper showing in any particular case." Accordingly, assuming that DBSC continues to proceed with due diligence, it may, when appropriate, request an extension of time within which to initiate DBS service pursuant to its permit.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re Application of

DIRECTSAT CORPORATION File No. DBS-88-02

For Assignment of Direct Broadcast Satellite Orbital Positions and Channels

## MEMORANDUM OPINION AND ORDER

**Adopted: November 3, 1993; Released: November 10, 1993**

By the Chief, Video Services Division:

1. On August 15, 1989, the Commission granted the application of Directsat Corporation ("Directsat"), for authority to construct a Direct Broadcast Satellite ("DBS") system, conditioned on Directsat's "due diligence" in the construction of its system. *Continental Satellite Corporation*, 4 FCC Rcd 6292, 6300 (1989) (*"Continental"*). The due diligence requirement, which is set forth in Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), provides, *inter alia*, that a DBS permittee must begin construction or complete contracting for the construction of its satellite(s) within one year of the grant of its construction permit. Under the policy established by the Commission in *Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 FCC 2d 250, 253 (1983) (*"DBS Processing Procedures"*), particular orbital positions and channels are not assigned to a DBS permittee unless and until it demonstrates that it has fulfilled this component of the due diligence requirement. Now under consideration are documents and information submitted by Directsat to demonstrate that it has completed contracting for the construction of its satellites, thereby complying with the first component of the due diligence requirement; and requests from Directsat for the assignment of particular orbital positions and channels.

2. In *Continental*, *supra*, the Commission determined that, in the interest of spectrum efficiency and in light of the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83"),[1] "half-CONUS" signals[2] would be allocated only in east/west pairs, with eastern half-CONUS service permitted only from the four DBS orbital positions farthest east (61.5$^0$W, 101$^0$W, 110$^0$W, and 119$^0$W, referred to as "eastern orbital positions"); and western half-CONUS service permitted only from the four DBS orbital positions farthest west (148$^0$W, 157$^0$W, 166$^0$W, and 175$^0$W, referred to as "western orbital positions"). *Id.* at 6293. Accordingly, Directsat was authorized to construct a DBS system consisting of (a) two or more satellites delivering eleven (11) half-CONUS channels of DBS service to each half of the continental United States, or (b) one or more satellites delivering eleven (11) full-CONUS channels of DBS service to the entire continental United States. *Id.* at 6300.[3]

3. On March 21, 1990, Directsat filed a letter with the Commission stating that it had entered into a contract with General Electric Company, Astro-Space Division ("GE Astro"), for the construction of two 16-channel DBS satellites, and that the first payment to GE Astro under the contract had been made. Directsat states that the contract demonstrates compliance with the first aspect of the due diligence requirement of Section 100.19(b) of the Commission's Rules. Attached to Directsat's March 21, 1990 letter are portions of its contract with GE Astro. These contract portions contain, among other information, provision for the construction of two satellites, with an option for up to three more; a payment schedule; a list of construction progress milestones; and a signature page bearing the signatures of Mr. Frank S. Trumbower, president of Directsat, and Dr. L. R. Greenwood, division vice president and general manager of GE's Astro-Space Division.

4. On April 29, 1992, Directsat filed an amendment to its due diligence showing based upon an amendment to its satellite construction contract with GE Astro, and submitted portions of the contract amendment, including a revised payment schedule; a revised delivery schedule; and a signature page bearing the signatures of Mr. Trumbower of Directsat, and Mr. R. A. Amadio, manager, business operation finance of General Electric Company/Astro-Space Division. Also attached to Directsat's April 29, 1992 filing are (i) a revised construction milestone schedule; (ii) statements from Mr. Trumbower of Directsat and Mr. J. T. Lettiere, manager of commercial communication programs contracts for GE's Astro-Space Division, verifying the existence of the contract, as amended, and the accuracy of the information regarding that contract, as amended, which has been submitted to the Commission; and (iii) a "Summary Report of Program Milestones and Progress." This Summary Report indicates that the first three milestones specified in the original construction milestone schedule submitted on March 21, 1990 had been accomplished ahead of schedule, and that the first three payments specified in the original payment schedule had been made ahead of schedule. Further, although the Summary Report states that certain construction milestones relating to system design could not yet be met because specific orbital positions and channels had not yet been assigned, it lists numerous other activities and efforts on the part of Directsat and GE Astro to advance the design and construction of the satellites called for in the contract. On

---

[1] The essential provisions of the RARC-83 agreements were incorporated into Appendix 30 (Orb 85) and Appendix 30A (Orb 88) of the International Telecommunications Union (ITU) Radio Regulations, as modified at the World Administrative Radio Conferences in 1985 and 1988. *See* para. 14, *infra*.

[2] Signals from DBS satellites which cover half of the continental United States are referred to as "half-CONUS" signals; those which cover the entire continental United States are referred to as "full-CONUS" signals.

[3] The four eastern orbital positions, 61.5$^0$W, 101$^0$W, 110$^0$W and 119$^0$W, may be technically suitable for delivering DBS service to any part of the continental United States. *Id.* at 6293-94. Western service, as a component of a full-CONUS signal, was authorized from eastern orbital positions, under the condition that any such authorization may be modified or rescinded if subsequent technical studies indicate that such service would violate the interference parameters of the Region 2 Plan. *Id.* at 6294.

April 30, 1992, Directsat filed the technical appendices to its amended contract with GE Astro, which contain a detailed description of the design characteristics and specifications of the satellites to be built under the contract. On May 7, 1992, the Commission received a letter from Mr. Lettiere of GE Astro indicating that Directsat had made the first payment due under the contract amendment. Thus, Directsat made the first four payments to GE Astro in a timely manner.

5. In a progress report filed on August 12, 1993, Directsat notified the Commission that its satellite construction contract with GE Astro had been assigned to Martin Marietta Astro Space Corporation ("Martin Marietta"); and that the scheduled payment due on July 31, 1993, had been made. Attached to this submission is a copy of an amendment to Directsat's satellite construction contract dated March 31, 1993, which reflects the merger of GE Astro with Martin Marietta, and the assignment of the contract to Martin Marietta. This amendment, which is signed by Mr. Trumbower of Directsat and Mr. Peter DeMayo, vice president, contracts, of Martin Marietta, states that Martin Marietta "agrees to fully assume all of the obligations of and be bound by the terms of the Directsat Contract", and that "[a]ll other terms of the Directsat Contract shall remain as originally agreed upon." Also attached to Directsat's August 12, 1993 submission is a redacted copy of an amendment to the Directsat/Martin Marietta contract dated July 23, 1993, which contains, *inter alia*, modification of the delivery and launch dates for Directsat's first two satellites; a reiteration of the option for the construction of up to three additional satellites; and a revised payment schedule. This July 23, 1993 amendment is accompanied by a letter dated August 4, 1993, from Mr. H. T. Riley, manager of commercial contracts for Martin Marietta, stating that the redacted copy of the July 23 amendment submitted by Directsat is a true and accurate copy of the amendment. In a supplemental progress report filed on August 23, 1993, Directsat provides a revised construction milestone schedule, and a letter from Mr. Riley stating that the fifth and sixth payments had been made as specified in the revised payment schedule.

6. In a letter filed October 12, 1993, Directsat requests the assignment of even-numbered channels 2-20 at orbital position $119^0$W and one channel at orbital position $110^0$W for its eastern allocation, and odd-numbered channels 1-21 at orbital position $175^0$W for its western allocation.

## DISCUSSION

7. In *Tempo Enterprises, Inc.*, 1 FCC Rcd 20 (1986) (*"Tempo"*), the Commission summarized the basic foundation for demonstrating compliance with the first component of the due diligence requirement:

> There is a contract, signed by both parties, which contains no unresolved contingencies which could preclude substantial construction of the satellites. The essential terms of the contract are verified by the submission of relevant portions of the document or by the principal's sworn statement as to contents, verified by...[the satellite construction contractor]. Specific satellites and their design characteristics are identified, and dates for the start and completion of construction are specified. The payment terms and schedule are described sufficiently to demonstrate the parties' investment/commitment to completion of the system.

*Id.* at 21. In *United States Satellite Broadcasting Company, Inc.*, 3 FCC Rcd 6858 (1988)(*"USSB"*), the Commission clarified the contractual details which must be provided to demonstrate due diligence. The contracts or contract descriptions must include "regular[,] specific construction progress milestones in the construction timetable", *id.* at 6861, and "payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and to indicate that the milestones listed for the early stages of construction constitute meaningful levels of advancement in the satellite construction process." *Id.* at 6862 n.20.

8. An analysis of Directsat's payment schedule, as amended, reveals that, with the exception of the first six payments, which have already been made, payments are to be made on specified dates over a period of 53 months, from January 31, 1994 to June 30, 1998. According to that schedule, by July 31, 1995, approximately one-third of the way through the 53-month payment period (and two years and two months before delivery of the first spacecraft), Directsat shall have paid 57.196% of the total contract price. By March 31, 1996, halfway through the payment period (and one and one-half years before delivery of the first spacecraft), Directsat shall have paid 81.605% of the total contract price. By September 30, 1997, when delivery of the first spacecraft is scheduled, Directsat shall have paid 98.720% of the total contract price. By March 31, 1998, when delivery of the second spacecraft is scheduled, Directsat shall have paid 99.828% of the total contract price. Under this payment schedule, "the initial payments are significant, and the majority of payments are due during the middle phases, well before the end of the construction period." *Tempo*, 1 FCC Rcd at 21. Further, as indicated above, Directsat has made the first six payments under the contract in a timely manner. Thus, it appears that Directsat clearly has made, and will continue to make, a financial commitment to the construction of the satellite. *USSB*, 3 FCC Rcd at 6862 n.20. Accordingly, Directsat's payment schedule is sufficient to satisfy the due diligence requirements established by the Commission.

9. In its original construction milestone schedule Directsat listed 23 construction milestones to be achieved on specified dates over a period of 56 months, from May, 1992, to January, 1997. As stated above, the Summary Report of Program Milestones and Progress submitted with Directsat's April 29, 1992 filing indicates that the first three milestones specified in the original construction milestone schedule had been accomplished ahead of schedule. In its amended milestone schedule, Directsat lists 21 construction milestones, including delivery of spacecraft in September, 1997, and March, 1998.

10. The essential terms of the contract, as amended, have been described in Directsat's various submissions to the Commission, and verified by the submission of the relevant portions of the document. That contract identifies specific satellites and design characteristics, and contains no unresolved contingencies. We believe that Directsat's payment schedule, its construction milestone schedule, and its efforts to adhere to that construction schedule, are clearly sufficient to "demonstrate...[its] investment/commitment to completion of the system." *Tempo*, 1 FCC Rcd at 21.

Accordingly, we find that Directsat's satellite construction contract, including the payment schedule and construction milestone schedule, as amended, are sufficient to demonstrate due diligence and justify the assignment of specific orbital positions and frequencies.[4]

11. For its eleven authorized eastern channels Directsat requests assignment of even-numbered channels 2-20 at orbital position 119°W and one channel at orbital position 110°W. For its eleven authorized western channels Directsat requests assignment of odd-numbered channels 1-21 at orbital position 175°W. These channels are available,[5] and will be assigned as requested by Directsat.

12. It is clear that a total of three satellites will be required to provide DBS service from the orbital positions and channels requested by and assigned to Directsat. Directsat's satellite construction contract with Martin Marietta calls for the construction of only two satellites, but contains an option for up to three more. Ordinarily, a DBS permittee is not assigned specific orbital positions and channels until it completes contracting for construction of the satellites necessary to provide service from those specific orbital positions and channels. *DBS Processing Procedures*, 95 FCC 2d at 253. *See, e.g., EchoStar Satellite Corporation*, 7 FCC Rcd 1765, 1770-72 (1992). However, in the instant case, it was not possible for Directsat to anticipate with certainty the number of satellites that would be required to provide its authorized service. The availability of channels at 119°W was dependent on the outcome of a proceeding involving another DBS permittee, which Directsat could not predict.[6] If channels at 119°W had not been available, Directsat would have been assigned eleven odd-numbered channels at orbital position 61.5°W for its eastern orbit/channel allocation, and it therefore could have provided all eleven channels of eastern half-CONUS service and all eleven channels of western half-CONUS service from the two satellites currently specified in its contract with Martin Marietta.

13. Under these circumstances, we do not believe that it would have been fair or reasonable to require Directsat to complete contracting for the construction of three satellites when it had reason to expect that its system might require only two. We believe that the proper course, the course followed by Directsat in this proceeding, was to complete contracting for the two satellites that it would certainly need, and to include in the contract the option to purchase sufficient additional satellites to complete the system configuration which might eventually be dictated by the availability of orbital positions and channels. Therefore, we will assign to Directsat orbital positions and channels for its entire three-satellite system. However, this assignment of orbital positions and channels shall be conditioned on Directsat's demonstration, within three (3) months of the release of this Order, that it has exercised the option in its satellite construction contract with Martin Marietta for the additional satellite necessary to establish its system. *Cf., Echostar Satellite Corporation, supra.*

14. *Additional Technical Information.* In order to issue a revised construction permit and insure that international coordination is initiated in a timely fashion, Directsat is directed to supply, within thirty (30) days of the release of this Order, updated technical information for its proposed satellites. This information should include the "Basic Characteristics to be Furnished in Notices Relating to Space Stations in the Broadcasting - Satellite Service," contained in Annex 2 of Appendix 30 (Orb 85) of the ITU Radio Regulations. Appropriate calculations should be supplied to demonstrate compliance with paragraphs 1 through 8 of Annex 1 of Appendix 30 (Orb 85), as applicable. Particular attention should be paid to shaped beam contours to ensure that they are of sufficient detail to permit verification of all necessary calculations. As a guideline, see paragraph 12(h) of Annex 2. Finally, Directsat should provide a detailed description of any technical characteristics to be utilized which differ from those assumed for international planning purposes, *e.g.*, the use of 26 MHz channel bandwidth. In this regard, Directsat should provide an analysis demonstrating that the proposed technical characteristics would not cause more interference or require more protection than the assumptions used for planning purposes. The Commission may, upon further analysis, impose whatever conditions or limitations it determines to be necessary in order to ensure compliance with applicable international provisions when the cumulative effects of various proposals are considered. This is particularly so with regard to multi-operator use of full-CONUS service beams from the four easternmost orbital positions. This additional technical information should be submitted with a request for the issuance of a construction permit and launch authority, accompanied by the appropriate filing fee specified in Section 1.1104(10)(a)(ii) of the Commission's Rules, 47 C.F.R. §1.1104(10)(a)(ii).

15. Accordingly, IT IS ORDERED, That Directsat Corporation is authorized to provide (i) eleven channels of eastern half-CONUS service, or eleven channels of full-CONUS service, on even-numbered channels 2-20 at orbital position 119°W, and on channel 24 at orbital position 110°W; and (ii) eleven channels of western half-CONUS service on odd-numbered channels 1-21 at orbital position 175°W. This assignment of channels to Directsat is made on the conditions (a) that Directsat submit, within thirty

---

[4] Directsat's construction permit application was granted on August 15, 1989. *Continental*, 4 FCC Rcd at 6300. Accordingly, pursuant to Section 100.19(b) of the Commission's Rules, 47 C.F.R. §100.19(b), Directsat's DBS system would be required to be in operation by August 15, 1995. According to the construction milestone schedule submitted with Directsat's initial due diligence showing, filed March 21, 1990, its first satellite was scheduled to be launched in September, 1994, and its second satellite was scheduled to be launched in March, 1995, within the time period required by the rules. In its revised construction milestone schedule, Directsat indicates that its first satellite is scheduled to be launched in November, 1997, and its second satellite is scheduled to be launched in May, 1998, both dates being after the date required by the rules. However, Section 100.19(b) contemplates granting extensions of time "upon proper showing in any particular case." Accordingly, assuming that Directsat continues to proceed with due diligence, it may, when appropriate, request an extension of time within which to initiate DBS service pursuant to its permit.

[5] In *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), the Commission cancelled DBS permittee Dominion Video Satellite's reservation of channels at orbital position 119°W. Dominion has filed a petition for reconsideration of that action. Accordingly, Directsat's assignment of channels at orbital position 119°W will be conditioned on the outcome of that proceeding.

[6] See footnote 5, *supra*.

(30) days of the release of this Order, the updated technical information described in paragraph 14 of this Order; (b) that Directsat demonstrate, within three (3) months of the release of this Order, that it has exercised the option in its satellite construction contract with Martin Marietta for the additional satellite necessary to establish its system, as discussed in paragraphs 12-13, *supra;* and (c) that Directsat's authorization may be modified or rescinded if analysis of updated technical information indicates that such service would violate the interference parameters of the Region 2 Plan or other international treaties or agreements. In addition, the assignment to Directsat of channels at orbital position $119^0$W is conditioned on the outcome of the proceedings arising out of a petition for reconsideration of *Dominion Video Satellite, Inc., supra.* (See footnote 5, *supra).*

16. This assignment of orbital positions and channels does not include launch and/or operational authority for any phase of Directsat's proposed DBS service. Upon submission of the updated technical information described in paragraph 14 of this Order, and a finding that such information is sufficient to establish compliance with international treaties and agreements, an instrument of authorization, including launch authority, as requested, will be issued.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

GUAM EDUCATIONAL RADIO FOUNDATION — File No. I-T-C-93-307

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, to Establish Channels of Communication between the U.S. and INTELSAT Atlantic and Pacific Ocean Region Satellites for the Provision of INTELSAT Business Service and to operate as an international resale carrier.

**ORDER AND AUTHORIZATION**

**Adopted: October 29, 1993; Released: November 10, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the provision of INTELSAT Busines Services (IBS) and the resale of switched voice service for the provision of switched services by Guam Educational Radio Foundation (GERF).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-307 IS GRANTED, and GERF is authorized to:

a. establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS between the U.S. and countries listed in Comsat's Tariff F.C.C. No. 103 for the space segment of IBS Service; and

b. provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Wiltel's Tariff F.C.C. No. 2 and Metromedia's Tariff F.C.C. No. 2 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the authority granted herein for GERF to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of GERF to provide private lines as part of its authorized service is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff -- that is, private lines which originate in the United States and terminate in one of those countries listed in Comsat's IBS tariff or which originate in one of those countries listed in Comsat's IBS tariff and terminate in the United States. In addition, GERF may not -- and GERF's tariff must state that GERF's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither GERF nor any persons or companies directly or indirectly controlling or controlled by GERF, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which GERF or any persons or companies controlling or controlled by GERF are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

BESCOM, INC. File No. I-T-C-93-258

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide resold international switched and private line services.

**ORDER AND CERTIFICATE**

**Adopted: November 1, 1993; Released: November 10, 1993**

By the Chief, International Facilities Division:

1. The above-captioned application filed by Bescom, Inc. (Bescom) requests authority to resell (i) international switched services between the United States and various international points, (ii) international private lines for the provision of private line services not interconnected to the public switched network (PSN) between the United States and the Republic of Korea, Japan, Hong Kong, Taiwan, and the People's Republic of China, and (iii) international private lines to provide switched services between the United States and Canada only.

2. The application was placed on public notice on July 21, 1993. Subsequently, AT&T filed a Petition to Deny, in response to which Bescom filed an Opposition.

3. AT&T's petition addresses two issues. First, AT&T argues that Canada does not afford resale opportunities equivalent to those available under United States law. Second, AT&T urges the Commission to impose additional reporting requirements as a condition to Bescom's authorization to resell international private lines for switched services between the United States and Canada.[1]

4. The Commission addressed the issue of Canadian equivalency in the *fONOROLA Corporation and EMI Communications Corporation* (fONOROLA/EMI Order).[2] In that Order, the Commission found that Canada affords equivalent resale opportunities. As a result, resale of international private lines for switched services and of interconnected international private lines for private line services between the United States and Canada is permitted subject to appropriate authorization.[3] However, subsequent to the Commission's equivalency determination, AT&T filed a petition for reconsideration of the *fONOROLA/EMI Order* in which it raised the same issues that it raises here. Specifically, AT&T argues there that Canada does not afford equivalent resale opportunities and that the Commission should adopt monthly reporting requirements for all private line resellers. We will address these issues in the context of AT&T's petition for reconsideration of the fONOROLA/EMI Order.[4] We, therefore, grant this authorization subject to possible modification or revocation based on the outcome of that pending petition for reconsideration.

5. Accordingly, IT IS ORDERED that application File I-T-C-93-258 IS GRANTED and Bescom is authorized to resell international switched services of authorized carriers pursuant to tariff, as specified in fn.5, for the provision of switched services between the United States and various international points as listed in those tariffs.

6. IT IS FURTHER ORDERED that Bescom is authorized to resell international private lines for the provision of switched services between the United States and Canada only.

7. IT IS FURTHER ORDERED that Bescom is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line services between the United States and each of the five (5) international points, as specified in Appendix A.[5]

---

[1] Specifically, AT&T urges the Commission to impose monthly traffic reporting and tracking requirements to determine whether the net settlements outpayment increases as a result of the interconnection of private lines from Canada to the United States PSN. As proposed, the monthly traffic reports would indicate a private line reseller's billed minutes, broken down by service category. The test would require the Commission to suspend international resale authorizations between Canada and the United States pending further investigation if for three consecutive months the traffic reports demonstrate an increase in U.S. outpayments attributable to more southbound than northbound minutes diverted to international private lines.

[2] *See* fONOROLA/EMI Order, 7 FCC Rcd 7312 (1992), petition for recon. pending.

[3] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion on U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, First Report and Order, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of the end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992)).

[4] *See supra*, n.3.

[5] Bescom states that it will obtain the necessary capacity pursuant to tariffs of the underlying carriers authorized to provide switched and private line services as set forth in AT&T Tariffs F.C.C. Nos. 1, 2, 4, 9, 11, and 12; MCI International Telecommunications Corp. Tariff F.C.C. No. 1; US Sprint Tariffs F.C.C. Nos. 1, 2, 5, and 7; C&W Tariff F.C.C. No. 3; Litel

8. IT IS FURTHER ORDERED that our authorization of Bescom to provide international private lines for the provision of non-interconnected private line services is limited to the provision of such private line services only between the United States and those international points so specified in Appendix A -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix A, or which originate in one of the points listed in Appendix A and terminate in the United States. In addition, applicant may not -- and applicant's tariff must state that applicant's customers may not -- connect such private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for recon. pending.*

9. IT IS FURTHER ORDERED that Bescom is authorized to lease from appropriately authorized carriers and operate up to 56 DS-1 and 4 T-1 circuits for the provision of switched services between the United States and Canada only--that is, private lines which carry traffic that originates in the United States and terminates in Canada, or originates in Canada and terminates in the United States.

10. IT IS FURTHER ORDERED that Bescom is authorized to lease from appropriately authorized carriers and operate up to 56 DS-1 circuits and 4 T-1 circuits for the provision of non-interconnected international private line services between the United States and each of the five (5) countries identified in Appendix A.

11. IT IS FURTHER ORDERED that neither Bescom nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Bescom or any such persons or companies controlling or controlled by Bescom are parties.

12. IT IS FURTHER ORDERED that Bescom shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. IT IS FURTHER ORDERED that Bescom shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

14. IT IS FURTHER ORDERED that Bescom shall file semi-annual reports of circuit additions, pursuant to Section 63.15 of the Commission's Rules, 47 C.F.R. §63.15.

15. IT IS FURTHER ORDERED that Bescom shall file with the Commission a copy of any operating agreement entered into with its foreign correspondents within thirty (30) days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

16. IT IS FURTHER ORDERED that Bescom shall file all arrangements for private line interconnection to the United States public switched network, pursuant to Section 43.51(a) of the Commission's Rules, 47 C.F.R. §43.51(a).

17. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice, fONOROLA/EMI Order* (recon. pending), and any related proceedings.

18. IT IS FURTHER ORDERED that AT&T's petition to deny IS DEFERRED for consideration in the *fONOROLA/EMI Order*.

19. IT IS FURTHER ORDERED that grant of this authorization to resell international private lines for the provision of switched services between the United States and Canada is conditioned upon Canada's continuing to afford resale opportunities equivalent to those available under U.S. law.

20. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services that Bescom seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

21. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*See* Section 1.4(b) (2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

**APPENDIX A**

| Country | DS-1 Circuit Requirements | T-1 Circuit Requirements |
|---|---|---|
| Non-interconnected Private Lines for Private Line Services | | |
| Republic of Korea | 56 | 4 |
| Japan | 56 | 4 |
| Hong Kong | 56 | 4 |

Tariff F.C.C. No. 1; LDDS Tariff F.C.C. No. 1; Wiltel Tariff F.C.C. No. 2; WorldCom Tariff F.C.C. No. 1; TRT-FTCC Tariff F.C.C. No. 14; and FTCC Tariffs F.C.C. Nos. 17 and 23.

| | | |
|---|---|---|
| Taiwan | 56 | 4 |
| People's Republic of China | 56 | 4 |

Interconnected Private Lines for Switched Service

| | | |
|---|---|---|
| Canada | 56 | 4 |

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

MIAMI INTERNATIONAL GATEWAY, INC.

File No. I-T-C-93-204

Application for authority to operate as an international resale carrier.

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted: November 3, 1993; Released: November 10, 1993**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services from the U.S. to various international points on a resale basis by Miami International Gateway, Inc. (MIG).[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-204 IS GRANTED; and MIG is authorized to provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, Sprint's Tariffs F.C.C. Nos. 1 and 2, Cable and Wireless' Tariffs F.C.C. Nos. 1, 2, and 3, and St. Thomas and San Juan's Tariff F.C.C. No. 1 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that MIG shall obtain any necessary operating agreements in each of the countries to which it will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that neither applicant nor any persons or companies directly or indirectly controlling or controlled by applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which applicant or any persons or companies controlling or controlled by applicant are parties.

5. IT IS FURTHER ORDERED that MIG shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that MIG shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] On June 25, 1993, AT&T filed a Petition to Deny MIG's application, to which MIG replied on August 5, 1993. Subsequently, AT&T withdrew its Petition to Deny, since MIG no longer proposed to provide international call back service including code calling. *See* Letter, dated October 6, 1993, from Stephen C. Garavito, Senior Attorney, AT&T, to William F. Caton, Acting Secretary, FCC.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**LETTER**
**October 29, 1993**

**Released: November 10, 1993**

Trident Seafoods Corporation
Attention: Mr Robert D. Nelson, Counsel
5303 Shilshole Ave. N.W.
Seattle, WA 98107

Dear Mr. Nelson:

This is in response to your letter of December 1, 1992, requesting review of two notices of forfeiture bearing numbers 215FE0202 and 215FE0203 issued to Trident Seafoods Corporation for transmitting on marine channel 70 with an unauthorized emission type and failure to identify the stations involved by their assigned call signs.

In accordance with your request, we have carefully reviewed both cases. We find no new information in your letter that was not previously considered when the initial amount of the forfeitures was reduced from $6,000 to $1,000. However, after these forfeiture notices had been issued, the Commission reviewed and revised its standards for issuance of forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released: August 12, 1993). Based on the fact that there is no prior record of violations of this type from the vessels involved, we are cancelling these forfeitures. Notices of forfeiture bearing account numbers 215FE0202 and 215FE0203 are hereby cancelled.

We are retaining records of the rule violations involved with these forfeitures. If future similar violations are noted by stations licensed by your company, these records will be reviewed when determining what future penalties may be appropriate.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the matter of

The Computer Shop NAL Acct. No. 215LA0043

Liability for Forfeiture

**ORDER**

**Adopted: November 2, 1993 Released: November 10, 1993**

By the Field Operations Bureau:

1. The Bureau has before it a Petition for Reconsideration filed by the Computer Shop (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's September 9, 1992 action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Commission's Rules. 47 C.F.R. § 2.803.

2. Petitioner's request for cancellation is based on its financial inability to pay the forfeiture. Petitioner has submitted tax returns showing the business' financial status since its inception in January 1, 1991. Consistent with the Commission *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382 (released August 12, 1993), we are cancelling the monetary forfeiture penalty.

3. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by the Computer Shop is GRANTED. 47 C.F.R. § § 0.311, 1.106.

4. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested, to the Computer Shop.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

***LETTER***
**November 2, 1993**

**Released: November 10, 1993**

Harold Anderson
2101 Tudor Hills Court
Anchorage, AK 99507

Dear Mr. Anderson:

This is in response for your December 9, 1992 request for higher level review of the monetary forfeiture assessed to you bearing NAL/Acct. No. 315AN0014. The Notice of Apparent Liability was issued on October 19, 1992 in the amount of $2,000 and the Forfeiture Order was issued on November 18, 1992 for the same amount.

We are reducing the amount of the forfeiture to $150.

You claim that your violation was "an inadvertent use of an unauthorized frequency" and thus was not willful. We realize that your use of the unauthorized frequency was not done for the express purpose of violating a rule. It was done to expedite your communications. The fact that the transmitter was intentionally adjusted to operate on that frequency (as opposed to the transmitter being on that frequency due to a technical malfunction or the operator accidentally setting his dials to a wrong position) makes the operation willful within the strict legal definition. The intercepted communications indicate that the use of the unauthorized frequency was indeed intentional, prearranged and preplanned. Furthermore, the repeated use of the frequency on three separate dates indicates that such unauthorized frequency usage was a habitual practice. Your claim that the unauthorized frequency usage was for the purpose of escaping interference is not confirmed by the monitored communications.

The Commission has reconsidered the usual amount for this kind of violation. Considering that the violation occurred on 3 days, we are adjusting the amount of the forfeiture downward to $150. You are, accordingly, ordered to pay a forfeiture of $150. Payment should be made by check or similar instrument payable to the Federal Communications Commission. To assure that your payment is given proper credit, be sure to place the following number on the remittance: NAL/Acct. No. 315AN0014. Mail the remittance to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In the Matter of

Sagittarius Broadcasting
Corporation,
Infinity Broadcasting Corporation
of Pennsylvania, and
Infinity Broadcasting Corporation
of Washington, D.C.

Licensees of Radio Stations
WXRK(FM), New York, New York;
WYSP(FM), Philadelphia, Pennsylvania
and WJFK(FM), Manassas, Virginia

Petition for Reconsideration
of Forfeiture Order

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 25, 1993; Released: November 10, 1993**

By the Commission:

1. The Commission has under consideration a Petition for Reconsideration and Request for Stay filed by the captioned licensees on June 21, 1993. The petition asks for reconsideration of the Commission's May 20, 1993, *Memorandum Opinion and Order*, 8 FCC Rcd 3600 (1993) ("MO&O"), upholding a Forfeiture Order that assessed an aggregate forfeiture of $6,000[1] against said licensees for broadcasting indecent programming in violation of 18 U.S.C. § 1464.

2. The licensees contend that the MO&O failed to comply with basic requirements of Commission procedure and administrative due process in several respects. First, it is alleged that the MO&O improperly "requir[ed] new facts as a predicate to reconsideration." This argument simply misreads our decision. We did not dispose of the underlying petition, as licensees suggest, on the grounds that it did not provide new or additional facts and was therefore procedurally defective. Rather, we noted, as a matter of record, that no new or additional facts were submitted and that the arguments raised did not differ from those considered by the Bureau in its two detailed decisions in this case. In short, the MO&O merely established that the petition did not raise any matters that had not been before the Bureau. The decision then stated:

> We have reviewed [the Bureau's] decisions and the licensees' contentions. We find the Bureau's analysis and disposition of the issues raised proper and discern no basis in the subject petition to reverse or alter the Bureau's determination.

8 FCC Rcd at 3600. Thus, the Commission affirmed and adopted the Bureau's decisions and in so doing disposed of the licensees' petition on its merits.

3. Second, the licensees assert that the MO&O does not provide the "requisite reasoned analysis" to support its conclusions. We disagree. The underlying decisions in this proceeding have, as we noted in our MO&O, "carefully reviewed and disposed" of the licensees' multiple contentions.

4. Third, the licensees suggest that they have been denied due process by the Commission's failure to issue a general declaratory ruling concerning the effect on indecency determinations of licensee-sponsored surveys purporting to demonstrate the absence of children in the audiences of particular programs. Licensees contend that the Commission's refusal to act on their request for such declaratory relief has denied them a final order that might be judicially reviewed. This argument is entirely unpersuasive. The Commission is not obliged to issue declaratory rulings; rather, it may do so if, in its discretion, it believes such action is appropriate. *See* 47 C.F.R. Section 1.2. Moreover, the MO&O expressly considered the audience poll issue in the particular context of this case, finding that

> [t]he Bureau specifically addressed and properly rejected the licensees' contention that their audience poll adequately rebutted the presumption that children may be exposed to indecent material if that material is aired outside "safe harbor" hours.

8 FCC Rcd at 3600 (footnote omitted). Nothing more is necessary or required. In this regard, if the licensees choose to contest our collection action in District Court, they will have an opportunity for the court to review their arguments on this point.

5. With respect to substantive contentions, the licensees merely reiterate those arguments which they had previously submitted and which we have already found unavailing. We continue to believe that the underlying decisions in this proceeding thoroughly dispose of these arguments and see no purpose, other than further delay, in rearguing these matters. Indeed, we believe that justice will best be served by acknowledging that administrative remedies have been exhausted in this case and by the the licensees expeditiously representing to the Commission their intentions with respect to the forfeitures previously imposed and here affirmed.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by the licensees on June 21, 1993, IS DENIED.

7. IT IS FURTHER ORDERED, That the Request for Stay, concurrently filed by the licensees, IS DISMISSED.[2]

---

[1] *Sagittarius Broadcasting Corporation (NAL)*, 5 FCC Rcd 7291 (MMB 1990), *Forfeiture Order*, 7 FCC Rcd 6873 (MMB 1992).

[2] The request sought a stay of further enforcement action in this proceeding until the Commission ruled upon the petition for reconsideration that we today deny. Given our action, the request for stay is moot and is therefore dismissed.

8. IT IS FURTHER ORDERED, That Sagittarius Broadcasting Corporation, licensee of Station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of Radio Station WYSP(FM), Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of Radio Station WJFK(FM), Manassas, Virginia, FORFEIT to the UNITED STATES OF AMERICA the sum of two thousand dollars ($2,000) each for their violations of Section 1464 of Title 18 of the United States Code.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-209**

In the Matter of

Amendment of Section 73.202(b) RM-8282
Table of Allotments,
FM Broadcast Stations.
(Rainelle, West Virginia)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 19, 1993; Released: November 12, 1993**

By the Assistant Chief, Allocations Branch:

1. At the request of R-B Company, Inc. ("petitioner"), licensee of Station WRRL-FM, Channel 237A, Rainelle, West Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 4928 (1993), proposing the substitution of Channel 237B1 for Channel 237A at Rainelle, and the modification of its construction permit to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substituting Channel 237B1 for Channel 237A at Rainelle, West Virginia, since it would provide the community with a wide coverage area FM service. Channel 237B1 can be allotted to Rainelle in compliance with the Commission's minimum distance separation requirements with a site restriction of 21 kilometers (13 miles) northeast to avoid a short-spacing to Station WXIL, Channel 236B, Parkersburg, West Virginia.[1] In accordance with Section 1.420(g) of the Commission's Rules, we will also modify Station WRRL-FM's license to specify operation on Channel 237B1 at Rainelle.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 27, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

| City | Channel No. |
|---|---|
| Rainelle, West Virginia | 237B1 |

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of R-B Company, Inc., for Station WRRL-FM, Rainelle, West Virginia, IS MODIFIED to specify operation on Channel 237B1, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, R-B Company, Inc., licensee of Station WRRL-FM, is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 237B1 at Rainelle are North Latitude 38-07-21 and West Longitude 80-37-37.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-222**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8297 |
| Table of Allotments, | |
| FM Broadcast Stations. | |
| (Moberly, Missouri) | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 28, 1993; Released: November 12, 1993**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5211 (1993), proposing the allotment of Channel 247C3 to Moberly, Missouri, as that community's third FM broadcast service. The *Notice* was issued in response to a petition filed by KWIX Inc. ("petitioner").[1] Petitioner filed comments reiterating its intention to apply for the channel.[2] FM 105, Inc. ("FM 105") filed comments supporting the allotment of Channel 247C3 at Moberly, indicating it intends to apply for the channel, subject to compliance with the Commission's local ownership rules.[3] Late-filed comments were submitted by FM 105 withdrawing its interest in Channel 247C3 at Moberly.[4]

2. We believe the public interest would be served by allotting Channel 247C3 to Moberly, Missouri, since it would provide the community with additional broadcast service. As indicated in the *Notice*, Channel 247C3 can be allotted to Moberly in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 15.2 kilometers (9.5 miles) east of the community.[5] The site restriction will prevent a short spacing to the construction permit for Station KRLI, Channel 248C3, Malta Bend, Missouri.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 27, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Moberly, Missouri | 247C3, 284C, 288C3 |

4. The window period for filing applications for Channel 247C3 at Moberly will open on **December 28, 1993,** and close on **January 27, 1994.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner is the licensee of Stations KWIX(AM) and KRES(FM), Moberly, Missouri.

[2] In response to the *Notice*, petitioner provided information showing it is eligible to acquire a third station at Moberly under the local ownership rules. *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992).

[3] FM 105 is the licensee of Station KZZT(FM), Channel 288C3, Moberly, Missouri. FM 105 has requested the substitution of Channel 288C2 for Channel 288C3 at Moberly in MM Docket 93-99. *See* 8 FCC Rcd 2745 (1993).

[4] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we will accept FM 105's comments for the purpose of withdrawing its expression of interest in Channel 247C3 at Moberly.

[5] The coordinates for Channel 247C3 at Moberly are 39-26-22 and 92-15-28.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-204**

In the Matter of

Amendment of Section 73.202(b), RM-8266
Table of Allotments,
FM Broadcast Stations.
(Provincetown, Massachusetts)

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 29, 1993; Released: November 12, 1993**

By the Assistant Chief, Allocations Branch:

1. Pursuant to the request of Lower Cape Communications, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 4924 (1993), proposing the substitution of Channel 221A for Channel *220A at Provincetown, Massachusetts, and reservation of the channel for noncommercial educational use. Petitioner also requested modification of its license for Station WOMR, Channel *220A, to specify operation on Channel 221A. Supporting comments were filed by the petitioner reiterating its intention to apply for the channel.[1] The University of Massachusetts ("University") filed comments.

2. University states that it is the applicant for a new noncommercial educational FM station on Channel 220A at Falmouth, Massachusetts, that is mutually exclusive with petitioner's proposal for Provincetown. University further states that it has filed an amendment to its application (BPED-930114MC) for Channel 220A to request processing under Section 73.215 of the Rules with respect to Station WOMR. According to University, the processing of its application for Falmouth need not depend on the outcome of the rulemaking proceeding as the conflict has been resolved.

3. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (201-220). Exceptions have been made in cases where channels in the noncommercial educational band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. As Provincetown is located on the outer edge of the 47 dBu service contour of Television Station WLNE, Channel 6, New Bedford, Massachusetts, Station WOMR is precluded by the provisions of Section 73.525 of the rules from operating on Channel 220 with full Class A facilities. Further, because Station WOMR is required to protect co-channel Television Station WUMB, Boston, Massachusetts, it is limited to a non-directional power of approximately 1.0 kilowatt from an antenna 100 meters above average terrain. Potential interference to Stations WLNE and WUMB, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use.

4. In response to the *Notice*, petitioner states that allotment of Channel 221A at Provincetown will have no preclusionary impact on non-commercial channels 218, 219 and 220. According to petitioner, allotment of Channel 221A in Provincetown will permit the use of Channel 220A in Falmouth as currently requested by the University of Massachusetts and will clear the way for the use of Channel 219 in the Lower Cape communities of Orleans, Chatham, Eastham and Brewster. Currently, use of Channel 218 is precluded by Channel 220A at Provincetown and by Channel 218A in Sandwich, Massahcusetts. Depending on the amount of power requested by a Channel 218 applicant, the substitution of Channel 221A for Channel 220A at Provincetown will have only a minor effect on the area where Channel 218 can be used. Petitioner notes that use of Channel 218 on the Lower Cape would preclude use of Channel 219 in the same area. Petitioner asserts that allotment of Channel 221A in place of Channel 220A at Provincetown will make it easier to establish new non-commercial stations on Cape Code.

5. After a review of the comments, we conclude that the reservation of a commercial channel is justified. No party has expressed an interest in the use of the channel as a commercial facility. Channel 221A can be allotted to Provincetown, Massachusetts, in compliance with the Commission's minimum distance separation requirements at petitioner's proposed site.[2] Although Channel *221A at Provincetown is short spaced to the site proposed by the University of Massachusetts in its application for Channel *220A at Falmouth, Massachusetts, University filed an amendment requesting that its application be processed pursuant to Section 73.215 of the Rules which provides contour protection for short spaced allotments. A Commission engineering analysis confirms that assuming maximum Class A facilities for Station WOMR, Channel *221A, Provincetown, and actual facilities for the application for Channel *220A, Falmouth, the possibility of interference has been removed.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 27, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

| Community | Channel No. |
|---|---|
| Provincetown, Massachusetts | *221A |

[1] In response to the *Notice*, petitioner also provided an affidavit verifying the statements in the petition.
[2] The coordinates for Channel *221A at Provincetown are 42-03-54 and 70-09-34.

7. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WOMR, Provincetown, Massachusetts, IS MODIFIED, to specify operation on Channel *221A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLED-820405AA except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLED-820405AA, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-139**

In the Matter of

| | |
|---|---|
| Amendment of Section 73.202(b), | RM-8211 |
| Table of Allotments, | RM-8307 |
| FM Broadcast Stations. | |
| (Anchorage and Seward, Alaska)[1] | |

**REPORT AND ORDER**
**(Proceeding Terminated)**

**Adopted: October 29, 1993; Released: November 12, 1993**

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 3880 (1993), issued in response to a petition for rule making filed by American Radio Brokers, Inc. ("petitioner"), licensee of Station KXDZ(FM),[2] Anchorage, Alaska, proposing the substitution of Channel 275C1 for Channel 275C2 at Anchorage,[3] and modification of the license for Station KXDZ(FM) accordingly. Petitioner filed comments and a counterproposal.[4] No other comments were received.[5]

2. In its counterproposal, petitioner proposed the substitution of Channel 276C1 for Channel 275C2 to afford it greater flexibility in the selection of a suitable transmitter site. Additionally, to accommodate its proposal, petitioner requested the substitution of a Class A Channel[6] for vacant and unapplied for Channel 276A at Seward, Alaska.[7]

3. We believe the public interest would be served by substituting Channel 276C1 for Channel 275C2 at Anchorage since it will enable Station KXDZ(FM) to expand its coverage area. Additionally, we will substitute Channel 290A for Channel 276A at Seward, Alaska, to accommodate the petitioner's proposal.

4. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of American Radio Brokers, Inc. for Station KXDZ(FM) to specify operation on Channel 276C1 at Anchorage.

**Technical Statement**

5. Channel 276C1 can be allotted to Anchorage at the petitioner's presently licensed site located 7 kilometers (4.4 miles) southeast of Anchorage at coordinates 61-09-58 and 149-49-34. Channel 290A can be allotted to Seward without the imposition of a site restriction at coordinates 60-06-15 and 149-26-32.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 27, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

| City | Channel No. |
|---|---|
| Anchorage, Alaska | 225C, 247C1, 251C1, 255C1, 263C3,[8] 267C, 271C3, 276C1, 281C1, 287C1, 293C, |
| Seward, Alaska | 298C 290A |

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of American Radio Brokers, Inc. (BLH-871019KA) for Station KXDZ(FM), Anchorage, Alas-

[1] The community of Seward, Alaska, has been added to the caption.

[2] Assignment of the license for Station KXDZ(FM) from Korlyn Broadcasting, Inc. to American Radio Brokers, Inc. (File No. BALH-930216HW), was granted on May 4, 1993, and consummated on September 22, 1993.

[3] Although Station KXDZ(FM) currently operates on Channel 276A, its license was modified to specify operation on Channel 275C2 at Anchorage in MM Docket No. 88-29. *See* 4 FCC Rcd 8504 (1989).

[4] Public Notice of the counterproposal was given August 2, 1993, Report No. 1957 (RM-8307).

[5] Informal comments were filed by Don Nordin ("Nordin"), General Manager of Station KPXR(FM), Anchorage. However, Nordin's comments were not served on the petitioner, in violation of Section 1.420 of the Commission's Rules. *See also* paragraph 4 of the Appendix to the *Notice*. Consequently, Nordin's comments constitute an *ex parte* presentation and will not be considered herein. *See* Section 1.1200 of the Commission's Rules.

[6] Petitioner suggested the substitution of various Class A channels as a substitute for Channel 276A at Seward. Among those suggested, we have determined that Channel 290A is preferable since it would not impinge on any existing service in the Seward area.

[7] Although petitioner initially specified a transmitter site located 24.9 kilometers (15.5 miles) northwest of Anchorage at coordinates 61-26-10 and 149-59-57, it subsequently determined that a Class A channel substitution at Seward would enable it to accomplish its proposed upgrade modification for Station KXDZ(FM) at its presently licensed site.

[8] Station KBFX-FM was previously licensed on Channel 263C2 at Anchorage. However, its license was subsequently downgraded to Class C3 status as its specified facilities are equivalent to those of a Class C3 channel. *See Letter from Larry D. Eads, Chief, Audio Services Division to TCT Communications, Inc. (Station KBFX-FM)*, dated August 3, 1993. *See also, Public Notice*, Mimeo No. 3667, entitled "*Reclassification of FM Facilities Re MM Docket 88-375*." However, Section 73.202(b) of the Rules, the FM Table of Allotments has not been editorially amended to reflect the downgrading of Channel 263 at Anchorage. Therefore, we will make the change in the FM Table of Allotments in the context of this proceeding. Since the change is editorial in nature, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

ka, IS MODIFIED to specify operation on Channel 276C1 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, American Radio Brokers, Inc., licensee of Station KXDZ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect its upgrade at Anchorage, Alaska.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-284**

In the Matter of

Amendment of Section 73.202(b), RM-8375
Table of Allotments,
FM Broadcast Stations.
(Woodville, Mississippi and
Clayton, Louisiana)

## NOTICE OF PROPOSED RULE MAKING

**Adopted: October 29, 1993; Released: November 12, 1993**

**Comment Date: January 3, 1994**
**Reply Comment Date: January 18, 1994**

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by PDB Broadcasting ("petitioner"), requesting the substitution of Channel 299C3 for Channel 299A at Woodville, Mississippi, and deletion of vacant Channel 300A at Clayton, Louisiana. Petitioner also requests modification of its construction permit (BPH-890712MH) for Channel 299A to specify operation on Channel 299C3. Petitioner submitted information in support of the proposal and expressed an intention to apply for the channel, if allotted.[1]

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Woodville and the surrounding area with expanded service. Channel 299C3 can be allotted to Woodville, Mississippi, in compliance with the Commission's spacing requirements provided Channel 300A is deleted at Clayton, Louisiana.[2] We shall also propose to modify the construction permit for Channel 299A to specify operation on Channel 299C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We shall also seek comments as to whether we should delete Channel 300A at Clayton, Louisiana, to accommodate the upgrade at Woodville. Channel 300A was allotted to Clayton in MM Docket 91-247. *See* 6 FCC Rcd (1991). A filing window for Channel 300A was opened on January 14, 1992, and closed on February 13, 1992. The channel is vacant with no applications on file. If an application is filed during the comment cycle in this proceeding, the channel would be retained at Clayton, and no further consideration would be given to the proposed allotment of Channel 299C3 at Woodville. It is Commission policy not to delete a channel in which interest has been expressed, or, in this case, for which an application has been filed. Should it later appear, however, that there is undue delay in activating the channel in Clayton, we would consider a further petition to remove the channel at Clayton, Louisiana, to accommodate expanded service at Woodville. *See Billings and Lewistown, Montana,* 6 FCC Rcd 3632 (1991).

4. In view of the fact that the proposed allotment would provide expanded service to Woodville, Mississippi, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Woodville, Mississippi | 299A | 299C3 |
| Clayton, Louisiana | 300A | ---- |

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 3, 1994**, and reply comments on or before **January 18, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Donald B. Brady, President
PDB Corporation
141 McTyere
Jackson, Mississippi 39202

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

---

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 299C3 at Woodville are 31-13-43 and 91-07-22.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 93-279**

In the Matter of

Amendment of Section 73.202(b), RM-8368
Table of Allotments,
FM Broadcast Stations.
(Cal-Nev-Ari, Nevada)

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: October 20, 1993; Released: November 12, 1993**

**Comment Date: January 3, 1994**
**Reply Comment Date: January 18, 1994**

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Richard W. Myers ("petitioner") requesting the allotment of Channel 285A to Cal-Nev-Ari, Nevada, as its first local aural transmission service. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner acknowledges that Cal-Nev-Ari is not listed in the U.S. Census or incorporated.[1] It contends, however, that it is a viable community for licensing purposes, with a permanent population of approximately 300 persons. According to the petitioner, Cal-Nev-Ari is a geographically distinct community, bounded on all sides by federal government land. Further, petitioner states that the nearest communities with significant populations are over 25 miles away to the south and 45 miles to the north. Petitioner states that Cal-Nev-Ari has a lighted airstrip which is used by many of the local residents, a volunteer fire department, post office, 24-hour casino/restaurant, gasoline station, grocery store, restaurant, bar, motel and a RV park which accommodates overnight visitors and "snowbirds." Other essential services, such as police protection and schools, are provided by the county, not by a neighboring community. In addition, road signs identify Cal-Nev-Ari along U.S. Route 95. Petitioner states that the station would serve, and derive economic support from, the thousands of travelers along adjacent U.S. Route 95 and nearby Nevada Route 163, in addition to the residents of Cal-Nev-Ari.[2]

3. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined " "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. Cal-Nev-Ari is not listed in the U.S. Census.[3] According to the petitioner, Cal-Nev-Ari appears in a 1990 Commerce Department listing of populated places. However, the staff has been informed that Cal-Nev-Ari is not a recognized community by the U.S. Census Bureau. Further, the petitioner does not provide any supporting information about the Commerce Department report to which it alludes, such as the purpose of the listing and what criteria the Commerce Department utilizes before finding that a place should be included in the listing. Therefore, the petitioner should present the Commission with sufficient information to demonstrate that Cal-Nev-Ari has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. With the exception of the casino, none of the businesses or organizations are specifically identified with names and addresses or shown to be intended to serve Cal-Nev-Ari as opposed to some other area.[4] See, *e.g.*, *Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

**Engineering Analysis**

4. Channel 285A can be allotted to Cal-Nev-Ari in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.6 kilometers (1.6 miles) southeast to avoid a short-spacing to Station KJUL, Channel 282C, North Las Vegas, Nevada.[5] Concurrence by the Mexican Government is required since Cal-Nev-Ari is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

5. We believe the petitioner's proposal to provide Cal-Nev-Ari with its first local aural transmission service, should it ultimately be deemed a community for allotment purposes, warrants further consideration. Therefore, we invite comments on the proposal, as indicated *infra*.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

| | Channel No. | |
|---|---|---|
| City | Present | Proposed |
| Cal-Nev-Ari, Nevada | -- | 285A |

[1] According to the petitioner, Cal-Nev-Ari is listed in the November 1990 Populated Places Listing published by the Department of Commerce.

[2] Petitioner reports that the 1992 Nevada State Highway Department estimates that approximately 6,485 vehicles pass Cal-Nev-Ari on Highway 95 every day. He also points out that the Commission has allotted channels to small communities which are primarily used to provide service to travelers, citing *Yermo and Mountain Pass, California*, 45 R.R. 2d 58 (1979).

[3] We note that Cal-Nev-Ari is listed in the 1993 Rand McNally Commercial Atlas and attributed with a population of 300. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi*, 48 FR 5974 (1983), *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991), and *Columbia, California*, 56 FR 26357 (1991), 6 FCC Rcd 3292 (1991).

[4] For example, petitioner states that the Police Department, Aviation Club, and AmVets frequently meet in Cal-Nev-Ari. However, Cal-Nev-Ari does not have a local police force and thus it appears that the meetings are held there simply because of the convenience of the location.

[5] The coordinates for Channel 285A at Cal-Nev-Ari are North Latitude 35-17-12 and West Longitude 114-51-57.

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **January 3, 1994,** and reply comments on or before **January 18, 1994,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Tannenwald, Esq.

Kathleen L. Franco, Esq.

Arent Fox Kintner Plotkin & Kahn

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5339

(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

**APPENDIX**

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**GN Docket No. 93-252**

In the Matter of

Implementation of Sections 3(n)
and 332 of the Communications Act

Regulatory Treatment of Mobile Services

**NOTICE OF PROPOSED RULE MAKING**

**Adopted: September 23, 1993; Released: October 8, 1993**

**Comment Date: November 8, 1993**
**Reply Comment Date: November 23, 1993**

By the Commission: Commissioner Duggan issuing a separate statement.

**TABLE OF CONTENTS**


| | Paragraph |
|---|---|
| I. INTRODUCTION | 1-2 |
| II. BACKGROUND | |
| A. Summary of Regulatory Treatment Provisions of the Budget Act | 3 |
| B. Regulatory Action Required For Implementation | 4 |
| III. DISCUSSION | 5-6 |
| A. Definitions | 7 |
| 1. Mobile Service | 8-9 |
| 2. Commercial Mobile Service | 10 |
| a. Service provided for profit | 11-13 |
| b. Interconnected service | 14-21 |
| c. Public switched network | 22 |
| d. Service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public | 23-27 |
| 3. Private Mobile Service | 28-33 |
| B. Regulatory Classification of Existing Services | 34 |
| 1. Existing Private Services | 35-40 |
| 2. Existing Common Carrier Services | |
| a. Terrestrial services | 41-42 |
| b. Satellite services | 43 |
| C. Regulatory Classification of Personal Communications Services | 44-48 |
| D. Application of Title II to Commercial Mobile Services | |
| 1. Statutory Provisions | 49 |
| 2. Background | 50-52 |
| 3. Discussion | |
| a. Disparate treatment of commercial mobile services and providers | 53-55 |
| b. Commission forbearance authority and the public interest test | |
| (i) Legislation | 56-59 |
| (ii) Forbearance from regulation | 60-68 |
| E. Other Issues | |
| 1. Right to Interconnection | 69-75 |
| 2. Foreign Ownership | 76-78 |
| 3. State Petitions to Extend Rate Regulation Authority | 79 |
| IV. PROCEDURAL MATTERS | 80-83 |
| APPENDIX | |


## I. INTRODUCTION

1. Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"),[1] signed into law August 10, 1993, amends Sections 3(n) and 332 of the Communications Act of 1934,[2] to create a comprehensive framework for the regulation of mobile radio services. As part of this undertaking, Congress has directed the Commission to commence a rule making to implement these sections as amended. In addition, the Budget Act directs the Commission to issue a rule making defining the regulatory status and treatment of Personal Communications Service (PCS) providers.

2. We are issuing the instant *Notice of Proposed Rule Making* (*Notice*) in response to Congress's mandate. Specifically, by our action today, we seek comment on proposals that would (1) address the definitional issues raised by the Budget Act; (2) identify various services, including PCS, affected by the new legislation and describe the potential regulatory treatment thereof; and (3) delineate the provisions of Title II of the Communications Act that will be applied to commercial mobile services and those provisions that, within the bounds of the discretion afforded by Congress, will be forborne.

[1] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).
[2] 47 U.S.C. §§ 153(n), 332.

## II. BACKGROUND

### A. Summary of Regulatory Treatment Provisions of the Budget Act

3. The Budget Act amends Sections 3(n) and 332 of the Communications Act (the "Act") to create a comprehensive regulatory framework for all mobile radio services, including existing common carrier mobile services, private land mobile services, and future services such as PCS. Under revised Section 332, which previously governed private land mobile service, mobile services are classified as either "commercial mobile service" or "private mobile service."[3] Commercial mobile service providers are treated as common carriers under the Communications Act, except that the Commission may exempt them from provisions of Title II other than Sections 201, 202, and 208. Private mobile services are not subject to any common carrier regulation. Section 332(c)(3) preempts state and local rate and entry regulation of both commercial and private mobile service, but allows the states to regulate other terms and conditions of commercial mobile service. In addition, states may petition for authority to regulate commercial mobile service rates under circumstances specified by statute.

### B. Regulatory Action Required For Implementation

4. The Budget Act requires the Commission to promulgate a variety of regulations to implement the "regulatory treatment" provisions contained in the legislation. First, the Commission must complete a rule making within 180 days of enactment implementing Section 332 as it affects the licensing of PCS.[4] This rule making must include a determination pursuant to Section 332(c)(1)(C) of the state of competition among commercial mobile services and the extent of Title II regulation that will be imposed on PCS providers. In addition, the Commission must issue regulations within one year of enactment generally implementing the "regulatory treatment" provisions of the Budget Act, including: (1) necessary modifications of our private land mobile rules, (2) regulations insuring that private services reclassified as commercial mobile services and substantially similar existing common carrier services will be subject to comparable technical requirements, (3) other regulations necessary to implement the amendments to Sections 332 and 3(n) of the Communications Act, and (4) provisions necessary to provide for an orderly transition.[5]

## III. DISCUSSION

5. The statutory revisions to Sections 332 and 3(n) of the Communications Act require us to decide and promulgate rules on a variety of issues: (1) How should we interpret and apply the statutory definitions of "commercial mobile service" and "private mobile service"? (2) How will existing common and private carrier services be classified under these definitions? (3) How will future services such as PCS be classified? (4) What degree of Title II regulation should be imposed on commercial mobile services? (5) What transitional measures are necessary to implement these legislative changes?

6. Although the Budget Act establishes different timetables for resolving these issues as they apply to PCS and as they apply to mobile services generally, we believe that many of these issues are sufficiently interdependent that they must be addressed comprehensively. Therefore, we are combining the PCS and non-PCS portions of our proposal into a single proceeding, and we intend to solicit comments and promulgate rules on all common issues within the 180-day time frame mandated by the legislation for PCS-related decisions.[6]

### A. Definitions

7. As revised by the Budget Act, Section 332 of the Communications Act, governs the regulation of all "mobile services" as defined in Section 3(n) of the Act. The statute divides all mobile services into two categories, "commercial mobile service" and "private mobile service," both of which are defined in Section 332(d), and confers power on the Commission to further specify these terms by regulation. We request comment on how these terms should be interpreted and, where appropriate, further specified in our regulations.

#### 1. Mobile Service

8. The definition of "mobile service" under revised Section 3(n) is similar to the prior version of Section 3(n), *i.e.*, "mobile service" continues to be defined as a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves," and includes "both one-way and two-way radio communications services." The Budget Act adds two subsections to Section 3(n) to specify additional services that are included within this general definition: (1) traditional private land mobile services, which

[3] For existing private land mobile licensees who fall within the definition of commercial mobile service, the statute sets forth several transitional provisions. Specifically, private licensees providing service prior to August 10, 1993 and private paging licensees on frequencies allocated as of January 1, 1993 will continue to be treated as private mobile service providers for three years after the date of enactment. Budget Act, § 6002(c)(2)(B). Nevertheless, as discussed at paras. 76-78 below, all reclassified private licensees are immediately subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act, and must file a waiver petition to grandfather existing foreign ownership by February 10, 1994.

[4] 47 U.S.C. § 332(c)(1)(D). This coincides with the Budget Act's mandate that we complete our PCS rule making within 180 days and commence licensing within 270 days of the date of enactment. *See* Budget Act, § 6002(d)(2).

[5] Budget Act, § 6002(d)(3).

[6] Specifically, we believe the definitional issues relating to regulatory classification should be addressed simultaneously with respect to all existing services as well as PCS. We also propose to address Title II forbearance issues on a comprehensive basis. We reserve the right, however, to defer resolution of any or all non-PCS issues until after the conclusion of the initial phase of this rule making. We anticipate that the initial report and order required to be issued in 180 days may be accompanied by a further notice on non-PCS issues not resolved at that point. As required by statute, all transition issues will be decided within one year of enactment of the legislation. *See* Budget Act, § 6002(d)(3).

were previously defined in Section 3(gg) of the Act (now deleted); and (2) personal communications services, whether licensed in our PCS docket or in a successor proceeding.

9. The amended Section 3(n) does not appear to substantively change the Act's prior definition of "mobile service." Instead, the amendment simply clarifies that private land mobile services and personal communications services are to be included within the general category of mobile services for purposes of regulation under Section 332. We tentatively conclude that the statutory definition is intended to bring all existing mobile services within the ambit of Section 332. We propose to include within this definition all public mobile services regulated under Part 22 of our rules, mobile satellite services regulated under Part 25, private land mobile services (Part 90), mobile marine and aviation services (Parts 80 and 87),[7] and personal radio services (Part 95).[8] In addition, we intend to treat all personal communications services licensed under our proposed Part 99 as mobile services. We request comment on this approach.

**2. Commercial Mobile Service**

10. Section 332(d)(1) provides that a mobile service will be classified as a "commercial mobile service" if it meets two criteria: the service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." "Interconnected service," in turn, is defined in Section 332(d)(2) as "service that is interconnected with the public switched network" or service for which an interconnection request is pending under Section 332(c)(1)(B). The statute expressly requires the Commission to specify "effectively available to a substantial portion of the public" and to define "interconnected" and "public switched network." We request comment on how the various elements of "commercial mobile service" should be defined or interpreted.

**a. Service provided for profit**

11. The first element of the definition of "commercial mobile service" is that the service must be "for profit."[9] The legislative history does not discuss this element, but we believe this language is intended to broadly distinguish between those mobile radio licensees who seek to provide mobile radio service on a for-profit basis to customers and those licensees who do not. Thus, government and non-profit public safety services[10] would be outside the scope of the commercial mobile service definition. Similarly, businesses that operate mobile radio systems solely for their own private, internal use would not be considered to be providing mobile radio services to customers for profit.

12. We seek to adopt rules that reflect this basic distinction between for-profit and non-profit services. Thus, we seek comment on when a mobile service that is offered by a licensee to customers would be considered a for-profit service for purposes of Section 332(d). For example, we seek comment on whether the for-profit test should be based on whether the service as a whole is offered on a commercial basis, as that term is used in Part 90 of our rules. Under this approach, a commercial service provider, as that term is used in Part 90, might be classified as a "for-profit" service even if it contended that the "interconnected" portion of its service was being offered on a non-profit basis. We also seek comment on whether a licensee who operates a system for internal use but also makes excess capacity available on a for-profit basis should be deemed to be providing for-profit service to that extent.[11]

13. Finally, we request comment on how the "for-profit" test should be applied to shared systems currently operating under Part 90.[12] One approach would be to treat such systems as not-for-profit so long as service is provided on a shared-cost basis, with no licensee seeking or obtaining a profit from the service. This approach is arguably consistent with the language of revised Section 3(n), which provides that "private" communications systems may be licensed on an "individual, cooperative, or multiple basis."[13] A related issue raised under this approach is whether parties to a non-profit cost-sharing arrangement could employ a for-profit entity to manage the system. Under Section 90.179 of our rules, a sharing arrangement is considered "for-profit" only where a licensee profits from the arrangement. The fees charged by a third-party manager are treated as a cost to be shared by the licensed users, and do not render the arrangement for-profit. We request comment on whether to continue using this approach in determining what services are for-profit under Section 332(d)(1). We also request comment regarding whether a for-profit system manager should be regulated as a commercial mobile service provider under this approach.

**b. Interconnected service**

14. The second element of the definition of "commercial mobile service" provides that "interconnected service"

---

[7] Most marine and aviation services regulated under Parts 80 and 87 appear to meet the statutory definition of "mobile service." However, to the extent that marine and aviation licensees provide fixed point-to-point service (*e.g.*, Operational Fixed Station licensees under Part 80, Subpart L, and Part 87, Subpart P), they would not be included within this definition.

[8] Part 95 services consist of General Mobile Radio Service, Radio Control Radio Service, Citizens Band Service, and Interactive Video and Data Service (IVDS). All of these services appear to meet the definition of mobile service except for IVDS, which is a fixed service and therefore beyond the purview of Sections 3(n) and 332.

[9] 47 U.S.C. § 332(d)(1).

[10] We note that some services in the Special Emergency Radio Service are offered to public safety entities by licensees on a for-profit basis. *See* discussion below at para. 35 n.46.

[11] Under our current rules, private land mobile licensees may share facilities that they use internally with other users on a for-profit, private carrier basis. 47 CFR § 90.179. However, licensees may only sell capacity to users who are themselves eligible to obtain a license in the service category in question. 47 CFR § 90.179(a). *See generally Report and Order*, PR Docket 89-45, 6 FCC Rcd 542 (1991). *See also* discussion at para. 25 below.

[12] Shared systems involve either an arrangement where the licensee offers excess capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed. *See generally Memorandum Opinion and Order*, Docket No. 18921, 93 FCC 2d 1127 (1983). The latter type of system, commonly referred to as "multiple-licensed" systems, takes the form of either non-profit cooperatives, where system costs are equally divided among all licensed users, or so-called "community repeaters," where one of the system licensees or an unlicensed third party manages the system for the other licensed users.

[13] 47 U.S.C. § 153(n)(2).

must be available.[14] "Interconnected service," in turn, is defined as service that is "interconnected with the public switched network" or "service for which a request for interconnection is pending . . . ."[15] Congress has required the Commission to define "interconnected" and "public switched network" through the rule making process. Accordingly, we seek comment on how interested parties would define both these terms.

15. From the legislative history, it appears that Congress intended by use of the term "interconnected service" to distinguish between those communications systems that are physically interconnected with the network and those systems that are not only interconnected but that also make interconnected *service* available. The Conference Report notes that under the language of the Senate version of Section 332, which was substantially adopted by the Conference Committee, "interconnected service must be broadly available," whereas the proposed House version would simply have required that only "one aspect" of the service be interconnected.[16]

16. We could interpret this to mean that in order for a particular service offering to be considered "interconnected service," interconnected service must be offered at the end user level, *i.e.*, the service must provide subscribers to mobile radio service with the ability to directly control access to the public switched network for purposes of sending or receiving messages to or from points on the network. Thus, a service that does not allow the subscriber directly to access the network may not be "interconnected service" even though the service provider may otherwise use the facilities of the public switched network. Another explanation of the distinction between "interconnection" and "interconnected service" could be that Congress was concerned that certain "private line" type services might interconnect with and use facilities of the public switched network, but that a subscriber would be able to send or receive messages only between limited points in the network. Under this interpretation, these services would not constitute interconnected service, but a service that allows a subscriber to send or receive messages over the public switched network would constitute an interconnected service. Commenters are asked to discuss these interpretations, as well as those types of service likely to be included or excluded by them.

17. We also seek comment on the degree to which prior Commission precedent concerning interconnection may be helpful in defining the term "interconnected." In light of our statutory obligation to define this term by regulation, we believe it is appropriate to examine our use of these terms in other contexts. We provide two examples of this approach and solicit comment on the efficacy of each. Commenters are also invited to suggest any new definitions that in their view are more appropriate.

18. In the context of cellular service, the Commission has defined "physical interconnection" under Part 22 of our rules:

> The term "physical interconnection" refers to the facilities' connection (by wire, microwave or other technologies) between the end office of a landline network and the mobile telephone switching office (MTSO) of a cellular network or the hardware or software, located within a carrier's central office, which is necessary to provide interconnection.[17]

Guidance on the meaning of interconnection can also be obtained from *International Satellite Systems (Intelsat)*,[18] in which the Commission barred international communications satellites systems competing with Intelsat from interconnecting "directly or indirectly" with any public switched message network. In that decision, the Commission specifically prohibited competing satellite systems from interconnecting through a private branch exchange (PBX) or by the manual interconnection of a switchboard operator or if a data circuit "terminates in a computer that can store and process the data and subsequently retransmit it over that network."[19] Thus, in this context, the Commission found these types of links to the public switched network to constitute interconnection with the public switched message network.

19. The Commission has also decided that current Part 22 providers are co-carriers to local exchange companies because they are generally engaged in the provision of local, intrastate, exchange telephone service.[20] Therefore, we request comments on whether a carrier that interconnects with a commercial mobile service provider necessarily offers interconnected service because its messages would be transmitted between its system and the rest of the public switched network. This interpretation would be consistent with a focus on the service being offered because the mobile service would offer customers an opportunity to contact anyone in the public switched network even if the service provider did not control any switching function.

20. We have also addressed the issue of interconnection of private land mobile services under Part 90 of our rules. In the private land mobile context, our rules define interconnection as "[c]onnection . . . with the facilities of the public switched telephone network to permit the transmission of messages or signals" between points in the telephone network and private land mobile radio users.[21] Under this definition, private land mobile licensees that use public switched facilities strictly for internal control purposes, such as "dial-up" circuits for transmitter control, are not considered to be interconnected.[22] The key to this definition, as interpreted, is whether the access to the public switched telephone network (PSTN) is under the exclusive control of the licensee or whether subscribers are permitted to routinely access the PSTN. If the licensee has

---

[14] 47 U.S.C. § 332(d)(1).
[15] 47 U.S.C. § 332(d)(2).
[16] H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 496.
[17] *Need To Promote Competition for Radio Common Carriers*, 2 FCC Rcd 2910, 2918 n.27 (1987) (*"Interconnection Order"*).
[18] *Report and Order*, Establishment of Satellite Systems Providing International Communications, CC Docket 84-1299, 101 FCC 2d 1046 (1985), *recon.*, *Memorandum Opinion and Order*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon.*, 1 FCC Rcd 439.
[19] *Id.*, 101 FCC 2d at 1101.
[20] *Interconnection Order*, 2 FCC Rcd at 2913.
[21] 47 CFR § 90.7.
[22] *Id.*

direct, real-time access to the PSTN, but the subscriber cannot obtain such access, the service offered to the subscriber may not be considered interconnected service.[23]

21. The approaches to interconnection described above have particularly important implications for our regulatory classification of "store-and-forward" services, such as paging services. In most paging systems, unlike two-way services, there is no "real-time" link through the telephone network between the sender and the receiver of the paging message. Instead, the sender typically provides the message to the paging operator by using a conventional telephone line, after which the operator "stores and forwards" the information, either manually or by computer, for subsequent radio transmission at a time within the licensee's sole control. Under the *Intelsat* rationale described above, store-and-forward could be considered a form of interconnected service because the customer can receive a message from any subscriber to the public switched network.[24] On the other hand, the Private Radio Bureau has applied a policy to private carrier paging that distinguishes store-and-forward service from interconnected service, although this policy has not been explicitly addressed by the Commission.[25] Under this interpretation, the use of the telephone network by a person who does not control the transmission of the radio message is analogous to an ordinary business call to the licensee, where the telephone link ceases before the message is sent to the subscriber. We request comment on which of these approaches to store-and-forward should be applied under the statute, or whether there are other alternatives that we should consider.

**c. Public switched network**

22. We seek comment on how we should define "public switched network." In general, we have used the similar term "public switched telephone network" or "PSTN" to refer to the local and interexchange common carrier switched network, whether by wire or radio.[26] Although the final statute uses the term "public switched network," we note that the House version of the legislation used the term "public switched telephone network," and that the Conference Report does not note any material difference between the two terms. We seek comment on whether our traditional interpretation of the term "public switched telephone network" should be applied to the statute. Alternatively, we seek comment on whether Congress intended this element of the statutory test to encompass more than the traditional network provided by local exchange and interexchange carriers.[27]

**d. Service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public**

23. The statutory definition of "commercial mobile service" requires that interconnected service be made available "to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."[28] This criterion would appear to be met by any interconnected service that is offered to the public without restriction, as existing common carrier services are offered. In addition, however, the reference to "classes of eligible users," as well as other provisions of the statute and legislative history, make clear that Congress intended to include some existing private services within the scope of its definition even if they are not offered to the general public without restriction.

24. We request comment on the revised standard, and particularly on what types of services should be deemed "effectively available to a substantial portion of the public" even though they are not offered to the general public without restriction, *i.e.*, they include some eligibility restrictions. One approach is to treat services as "effectively available" regardless of eligibility limitations so long as such services are available to a large sector of the public. For example, our Specialized Mobile Radio and private carrier paging eligibility rules, which define all persons and entities except foreign governments and their representatives as eligible users,[29] appear to impose virtually no practical limit on the public availability of the service.

---

[23] *See In re Data Com*, 104 FCC 2d 1311, 1312-15 (1986). In *Data Com*, we found that no interconnection was involved in a communications system where callers wishing to page subscribers placed a call through the PSTN to an answering service which then relayed the message to the intended recipient by activating the Data Com transmitter through a private radio frequency link. We held that because there was no direct connection between the Data Com transmitter and the PSTN, the caller could never activate the transmitter from a position in the PSTN, and Data Com system was therefore not providing interconnected service.

[24] *See* para. 18 above.

[25] Other than in *Data Com*, where we held that relaying of paging messages by an answering service was not interconnection, our prior cases involving private paging service have turned on whether the licensee was operating a shared-use system that would subject it to the interconnection prohibition contained in the prior version of Section 332. *See, e.g., In re Applications of Millicom Corporate Digital Comunications, Inc.*, 65 RR 2d 235, 237-239 (1983), *aff'd sub nom. Telocator Network of America v.* FCC, 761 F.2d 763 (1985) (because private carrier paging system is not shared by authorized users, interconnection restriction does not apply). In many instances, however, a PSTN-based caller seeking to send a paging message through a licensee-operated store-and-forward computer relay (as was the case in *Millicom)* arguably has no more control over the transmission of the message than a caller seeking to send a message through a licensee-operated answering service (as was the case in *Data Com)*. Thus, the Private Radio Bureau's view has been that the two fact situations are indistinguishable as far as interconnection is concerned. On the other hand, we have also authorized private paging licensees to provide "direct access" paging service, which enables a PSTN-based caller to activate the paging transmitter directly from a touch-tone telephone, and therefore could arguably be distinguished from *Data Com*. *See, e.g., Report and Order*, PR Docket 86-335, 2 FCC Rcd 2379 (1987). We therefore seek comment on whether our view of what constitutes interconnected service should be affected by the particular store-and-forward technology used by the service provider.

[26] For example, in discussing former Section 332(c)(1) of the Act, we have used the term "public switched telephone network" interchangeably with the phrase "telephone exchange or interconnection facility" used in the prior statute. *See, e.g., Memorandum Opinion and Order*, Docket No. 20846, 53 RR 2d 1469, 1470-1473 (1983). The term encompasses both wireline and wireless facilities of exchange and interexchange carriers. *See, e.g., Report and Order*, Basic Exchange Telecommunications Radio Service, 3 FCC Rcd 214, 217 (1988) (BETRS will provide wireless extension of intrastate basic exchange service in remote areas).

[27] *See* discussion at para. 19 above.

[28] 47 U.S.C. § 332(d)(1).

[29] *See* 47 CFR §§ 90.115, 90.603.

25. On the other hand, many private land mobile services targeted to specific businesses, industries, or user groups (*e.g.*, utilities, railroads, taxi companies) are arguably not intended for use by the public or even a "substantial portion" of the public. In the proposed House version of Section 332(d), "commercial mobile service" was defined in relevant part as service available to "broad classes of eligible users." The Conference Report notes that the word "broad" was deleted from this definition to ensure that "commercial mobile service" would encompass services offered to "*broad or narrow* classes of users so as to be effectively available to a substantial portion of the public."[30] This does not necessarily mean, however, that all services offered to "narrow" classes of users would be considered to meet this test. Instead, Congress arguably could have removed the reference to "broad" classes so that the sole issue in the case of *all* limited-eligibility services would be whether service is effectively available to a "substantial portion of the public." We seek comment, therefore, on whether we should draw a distinction between limited-eligibility services that are, as a practical matter, available to a substantial portion of the public and such services that are offered to small or specialized user groups.[31]

26. We also seek comment on whether system capacity should be a factor in determining whether a service is "effectively available to a substantial portion of the public. For example, while our SMR rules impose minimal limits on user eligibility, a traditional SMR system typically has a capacity of no more than 70 to 100 users per channel. If we were to determine public availability based on user eligibility alone, such limitations on system capacity would be immaterial. As a practical matter, however, the limit on the number of possible users requires many of these systems to offer highly specialized services tailored to the particular needs of small groups of subscribers. Historically, these systems have operated as private services because our private radio rules afford the flexibility needed to provide such service.[32] If we deem these services to be "effectively available" to the public, and therefore commercial mobile services, the issue arises whether this flexibility can be maintained. At the same time, if we consider low-capacity private systems not to be "effectively available," this could possibly require similar treatment of small common carrier mobile radio systems that also have very limited capacity. We note that while low capacity may constitute a significant limit on the public availability of private mobile services, it has not been a factor in deciding the regulatory treatment of common carrier mobile services.[33] We seek comment on these alternatives.

27. Similarly, we request comment on the possible impact of service area size and location on the public availability of mobile service. Although this issue is unlikely to affect the vast majority of mobile services, which are offered throughout standard local or regional service areas such as MSAs, RSAs, BTAs, or MTAs. it is also possible that mobile service providers could seek to serve customers in much smaller areas, such as individual office buildings or shopping centers. If such services emerge, one approach would be to treat them as effectively available to the public without regard to service area so long as they are generally available. Every service area has some geographic boundary, but if that area is open to the public and anyone can get service, there is no limitation on eligible users.[34] Alternatively, we could determine that highly localized service is not "public" service if it will be limited to a small number of users at any one time or if public access to the area is restricted. We seek comment on these alternatives.

### 3. Private Mobile Service

28. Section 332(d)(3) defines "private mobile service" as any mobile service that is not a commercial mobile service (as defined by Section 332(d)(1)) or the "functional equivalent of a commercial mobile service."[35] The reference to "functional equivalence" was added to the legislation in conference, although it had not been included in either the House or Senate proposed version of Section 332(d)(3). The Conference Report states that the language was amended to make clear that the term "private mobile service" "includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[36] As an example, the Report states that the Commission could determine that an interconnected service offered to the public is not "functionally equivalent" if it does not employ frequency reuse (or similar means of augmenting channel capacity) and does not provide service throughout a standard metropolitan statistical area or "similar wide geographic area." [37]

29. We request comment on how mobile services should be classified under this definition of "private mobile service." Based on the statutory language and the legislative history, we believe that more than one approach is possible. Under one interpretation, a mobile service would be classified as private if (1) it fails to meet the statutory definition of a commercial mobile service, or (2) it is not the functional equivalent of a commercial mobile service. Thus, a service that fell within the *literal* definition of a commercial mobile service could nonetheless be classified as private if we determined that it was not *functionally* equivalent. The practical effect of this interpretation would

---

[30] Conference Report at 496 (emphasis added).

[31] This does not necessarily mean a service provider could avoid offering "public" service merely by offering "customized" service. We seek comment on whether, if service is offered to the public or a substantial portion of the public, it would be "public" service within the meaning of Section 332(d)(1) regardless of whether it is offered indiscriminately or through individualized negotiation.

[32] For the most part, these traditional SMRs developed as an alternative for customers who would otherwise have to construct their own internal private systems to meet their mobile radio needs. *See generally, Second Report and Order,* Docket 18262, 46 FCC 2d 752 (1974) (subsequent history omitted).

[33] Our common carrier rules contain no minimum requirements for system capacity. However, a small system must make its capacity available in a manner that does not unreasonably discriminate.

[34] For example, a paging service made available only in a shopping center could arguably be available "to the public" within the shopping center.

[35] 47 U.S.C. § 332(d)(3).

[36] Conference Report at 496.

[37] *Id.*

be to expand, to a limited degree, the potential number of mobile services that would be classified as private as opposed to commercial mobile services.

30. This approach is arguably supported by the language and legislative history of Section 332(d)(3). In their respective proposed versions of this section, the House and Senate agreed that "commercial mobile service" should be specifically defined and that any mobile service failing to meet this definition would be classified as private.[38] In amending Section 332(d)(3) to include the "functional equivalence" test, the Conference Committee arguably did not change this basic statutory structure or modify the definition of commercial mobile service in Section 332(d)(1). Instead, the committee could be viewed as having added a separate basis for classifying services as private, and included in the Conference Report a specific example of a service meeting the literal definition of a commercial mobile service that nevertheless might not be functionally equivalent. This could be interpreted to support a broader, more flexible definition of "private mobile service." We request comment on this interpretation.

31. Another reading of the legislation arguably supported by the language and legislative history would provide that private mobile service does not include any mobile service that (1) fits the definition of a commercial mobile service, or (2) is the functional equivalent of a commercial mobile service. Under this alternative interpretation, a mobile service that did not squarely meet the statutory test for a commercial mobile service could still be classified as a commercial mobile service if we determined that it was a "functional equivalent." The Conference Report arguably supports this interpretation, as it states that the Conference Committee amended the definition of private mobile service to "make clear that the term includes *neither* a commercial mobile service *nor* the functional equivalent of a commercial mobile service, as specified by regulation by the Commission."[39] This interpretation also arguably comports with the view that functionally similar services should be subject to the same regulatory requirements. We seek comment on this alternative interpretation.

32. We also request comment on what specific standards we should use to determine whether a given mobile service is the functional equivalent of a commercial mobile service. Congress left to the Commission the specification of the functional equivalent of a commercial mobile service. The Conference Report, however, provides an example of a situation where the Commission can decide a service is not the functional equivalent of a commercial mobile service. The Conference Report states:

> The Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.[40]

This example appears to emphasize the functioning of the mobile service. Thus, whether a service would be considered the functional equivalent of a commercial mobile service could turn on whether it employs frequency or channel reuse and makes service available throughout a standard metropolitan statistical area or other wide geographic area. We seek comment on this interpretation.

33. The Commission has previously used a functional equivalency test to determine whether a common carrier unreasonably discriminated in its charges for like communication services.[41] In that context, the test for likeness focuses on whether services are different in any material functional respect.[42] The test requires the Commission to examine both the nature of the services and customer perception of the functional equivalency of those services.[43] Customer perception is the linchpin of this test.[44] We request comment on whether the Commission's existing functional equivalency test would be appropriate for determining whether a mobile service is the functional equivalent of a commercial mobile service. We also solicit alternative proposals for defining the functional equivalent of a commercial mobile service. Finally, we seek comment on whether, instead of adopting general rules regarding the test to be used in this context, we should leave the issue of functional equivalence to case-by-case (or perhaps service-by service) definition.

### B. Regulatory Classification of Existing Services

34. The Budget Act requires us to examine the regulatory status of all existing mobile services under the statutory definitions discussed above. We therefore seek comment on which existing mobile services will become commercial mobile services and which will become private mobile services under Section 332(d). In particular, we seek comment on the degree to which the new definitions require existing private services to be reclassified as commercial mobile services and on whether existing common carriers may be reclassified as private.

#### 1. Existing Private Services

35. In accordance with the exclusion of not-for-profit services from the statutory definition of commercial mobile service, we propose to classify all existing private non-commercial services as private mobile services under Sec-

---

[38] *Id.* at 495-496. The Conference Report notes that the proposed House version of Section 332 defined private mobile service as "anything that does not fall under commercial mobile service," and that the proposed Senate definition was "virtually identical."

[39] *Id.* at 496 (emphasis added).

[40] *Id.*

[41] *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, *Memorandum Opinion and Order on Remand*, 6 FCC Rcd 7039 (1991), *affirmed, Competitive Telecommunications Assoc. v. FCC, slip op.*, No. 92-1013 (D.C. Cir. Aug. 6, 1993); *Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790 (D.C. Cir. 1982); *American Broadcasting Cos. v. FCC*, 663 F.2d 133 (D.C. Cir. 1980); *Western Union International, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); *American Trucking Assoc. v. FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[42] *Ad Hoc Telecommunications Users Comm.*, 680 F.2d at 795.

[43] *Competitive Telecommunications Assoc.*, slip op. at 5.

[44] *Ad Hoc Telecommunications Users Comm.*, 680 F.2d at 796.

tion 332(d)(3). Our Rules have defined a non-commercial land mobile system as one "that will be used only for a licensee's internal use."[45] This includes government, public safety,[46] and non-commercial land mobile services under Part 90, private mobile marine and aviation services under Parts 80 and 87,[47] and personal mobile radio services under Part 95.

36. With respect to existing for-profit services regulated under Part 90, classification will depend on whether such services are providing "interconnected service" to the public or a "substantial portion of the public," as defined above. We seek comment on how this test will affect the classification of our existing SMR services. In general, we believe that wide-area SMR service should be considered available to a "substantial portion of the public" and therefore classified as commercial mobile service unless the particular service is otherwise excludable from the commercial mobile service definition. On the other hand, we request comment on whether we should classify as private mobile services those SMRs that do not offer wide-area service or do not employ frequency reuse to increase their capacity (*e.g.*, most traditional dispatch systems), on the grounds that such services are not available to a "substantial portion of the public" or that, under one possible interpretation of the statute discussed above, they are not the "functional equivalent" of commercial mobile service.

37. If we treat wide-area SMRs as available to a substantial portion of the public, both existing wide-area SMRs and pending proposals for expanded wide-area SMR service could be affected. For example, at 220 MHz, we are currently licensing both commercial nationwide systems, many of which are likely to provide for-profit interconnected service, and non-commercial systems, to be used for the primary purpose of meeting licensees' internal communications needs.[48] We seek comment on whether for-profit interconnected services provided by 220 MHz licensees should be classified as commercial mobile service and non-commercial services classified as private. We also have pending two proceedings that would enable applicants for SMR frequencies at 800 and 900 MHz to obtain a single license to 80 provide wide-area service.[49] If we determine that issuing wide-area licenses is in the public interest, we expect most such licensees to provide interconnected service over large areas to a large segment of the public. We seek comment on whether such services should be classified as commercial mobile service.

38. There may be instances, however, where wide area licensees provide non-interconnected service or do not serve a substantial portion of the public. For example, a service provider could offer a wireless service that is entirely separate from the public switched network.[50] We seek comment on whether such a service should be classified as private or whether, under an alternative interpretation of the statute discussed above, it could be considered a functional equivalent of commercial mobile service even though no interconnection is involved.[51] Other wide-area service providers may devote the majority of their system capacity to traditional dispatch service or service to specialized user groups such as railroads, utilities, or the trucking industry.[52] We seek comment on whether such services should be classified as private mobile service.

39. We also request comment on the regulatory treatment of private carrier paging (PCP) services under the new statute. In our view, these services are generally provided for profit and without significant restrictions on eligibility, service area, or capacity. Whether PCPs should be classified as commercial mobile services therefore will depend on whether they are providing interconnected service, or, under one interpretation discussed above, whether they are the "functional equivalent" of a commercial mobile service.[53] If we conclude that "store-and-forward" systems do not meet either of these criteria, we expect to classify most PCP systems as private mobile service. If we conclude that store-and-forward constitutes a form of interconnected service or that it should be deemed a functional equivalent, most PCP 5 systems would be classified as commercial mobile services.[54] We request comment on these alternatives.

---

[45] 47 C.F.R. § 90.717.

[46] As discussed in note 10 above, some Special Emergency Radio Services are offered to public safety entities by licensees on a for-profit basis. We seek comment on whether these services, like non-profit public safety services, should generally be classified as private mobile services on the grounds that they do not make service available to the public or a substantial portion of the public.

[47] Public coast station licensees, who are regulated under Part 80, Subpart J, as common carriers, would be classified as commercial mobile service providers.

[48] *See Memorandum Opinion and Order*, PR Docket No. 89-552, 7 FCC Rcd 4484 (1992), *recon. denied*, 8 FCC Rcd 4161 (1993). In addition, some local 220 MHz licensees may combine frequencies to offer commercial interconnected service on a regional basis.

[49] *See First Report and Order and Further Notice of Proposed Rule Making*, PR Docket 89-553, 8 FCC Rcd 1469 (1993) (proposal to assign 200 channels in a mixture of nationwide, regional, and local licenses); *Notice of Proposed Rule Making*, PR Docket 93-144, 8 FCC Rcd 3950 (1993) (proposal to create Expanded Mobile Service Provider category on 800 MHz SMR channels for provision of service to BTAs or MTAs).

[50] RAM Mobile Data, for example, is currently offering a wide-area data service at 900 MHz that is not physically interconnected with the public switched telephone network.

[51] Another pending proposal would permit licensees of Automatic Vehicle Monitoring (AVM) systems to provide location services to Part 90 eligibles, individuals, and the Federal government on a for-profit basis. *See Notice of Proposed Rule Making*, PR Docket 93-61, 8 FCC Rcd 2502 (1993). AVM systems locate and monitor the status of mobile units by means of radio transmission to and from central control points. Assuming we allow for-profit AVM systems, we request comment on how such systems should be classified based on the factors discussed in this *Notice*.

[52] Part 90 of our rules currently includes examples of services dedicated to defined user groups, including utilities, oil companies, manufacturers, railroads, and taxicab companies. *See generally* Part 90, Subpart D (Industrial Radio Services) and Subpart E (Land Transportation Radio Services). Commenters are encouraged to address the regulatory classification of these categories on a service-by-service basis.

[53] This same analysis must be applied to common carrier paging systems as well. *See* para. 41 below.

[54] In this context, it appears that Congress contemplated that some private paging services would become commercial mobile services. Section 6002(c)(2)(B) of the Budget Act specifically grandfathers existing private paging services as private mobile services for three years after enactment.

40. Assuming that some existing private land mobile services are reclassified as commercial mobile services and others are not, we must address how commercial and private mobile services would co-exist on common frequencies.[55] While we have traditionally assigned private and common carrier services to separate frequency bands, we believe that attempting to separate our existing private land mobile bands into separate allocations for commercial and private services would be impractical and unnecessary. Instead, we prefer to afford licensees on existing private land mobile frequencies the flexibility to provide either commercial or private service as defined by our rules.[56] One alternative would be to classify these licensees as either commercial or private mobile service providers based on their primary use of the spectrum. Another alternative would be to give licensees the option to provide both commercial and private service under a single license, imposing the appropriate classification and regulation on each type of service provided. We seek comment on the implications of each of these alternatives, and on any other possible approaches to this issue.

**2. Existing Common Carrier Services**

**a. Terrestrial services**

41. We also request comment on how existing common carrier services should be classified under revised Section 332. In our view, existing common carrier mobile services that provide interconnected radiotelephone service to the public (*e.g.*, cellular) will generally be classified as commercial mobile services. Depending upon how we resolve certain definitional issues, however, it is possible that some common carrier mobile services could be reclassified as private mobile services. We note that Congress did not enact any statutory provisions specifically addressing the reclassification of existing common carriers as private mobile services, in contrast to its detailed attention to the issue of private services being reclassified as commercial mobile services. Nonetheless, the statute appears to leave this possibility open if we conclude that an existing common carrier mobile service does not meet the definition of a commercial mobile service. For example, if we conclude that store-and-forward paging does not constitute interconnected service, as discussed above, common carrier paging systems that use store-and-forward could be subject to reclassification. We request comment on this alternative. In addition, we request comment on whether some of the smaller common carrier systems in the Public Mobile Services could be reclassified as private if we conclude that low capacity systems do not serve the public or a substantial portion of the public.[57]

42. We also request comment on whether we should amend our rules to allow existing common carriers who are classified as commercial mobile services to provide dispatch service in the future. While dispatch has been predominantly a private land mobile service over the past decade, Congress has given the Commission discretion to terminate the dispatch prohibition in whole or in part.[58] We seek comment on whether such an action would serve the public interest. First, is there any technical justification for continuing the prohibition on dispatch? Second, would eliminating the dispatch prohibition provide common carriers with greater flexibility to meet their customers' needs? Third, would eliminating the prohibition promote increased competition in the dispatch service marketplace and lower costs to subscribers?

**b. Satellite services**

43. Mobile services using the system capacity of a satellite licensee fall within Section 3(n) of the Communications Act. Under existing policy, the Commission may authorize a domestic satellite licensee to offer system capacity for the provision of mobile service on a non-common carriage basis. However, the Commission will refuse to allow a satellite licensee to offer system capacity on a private carriage basis if there is a showing that such regulatory treatment will run counter to the public interest.[59] Under Section 332(c)(5), Congress did not prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.[60] We tentatively conclude that we should continue our existing procedures for making this determination.[61] If the satellite system licensee opts to provide commercial mobile service directly to end users, however, it shall be treated as a common carrier.[62] Similarly, provision of commercial mobile service to end users by earth

---

[55] For example, our General Category channels in the 800 MHz band are available for use by multiple categories of private land mobile licensees, including private, non-commercial systems as well as SMRs and other private carriers. Thus, reclassification could cause some services offered on General Category channels to become commercial mobile services while other services on the same frequencies would remain private.

[56] This would not apply to licensees on bands set aside for exclusive non-commercial use (*e.g.*, public safety channels).

[57] *See* discussion at para. 26 above.

[58] *See* 47 U.S.C. § 332(c)(2). Our rules define dispatch communication as "[t]wo-way voice communication, normally of not more than one minute's duration, that is transmitted between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities." 47 CFR § 22.2.

[59] *See Martin Marietta Communications Systems, Inc.*, 60 RR 2d 779 (1986) (domestic satellite licensees may be authorized to offer transponders on a non-common carriage basis absent a showing that it would not be in the public interest).

[60] *See* 47 U.S.C. § 332(c)(5). In addition, Section 332(c) does not alter or affect the regulatory treatment of Comsat required by title IV of the Communications Satellite Act of 1962. 47 U.S.C. § 332(c)(4).

[61] In making this determination, the Commission looks to an array of public interest considerations. *See, e.g., Second Report and Order*, Gen. Docket No. 84-1234, 2 FCC Rcd 485, 490 (1987) (because only a single mobile satellite service license would be granted, space segment operator was placed under an obligation to provide service on a non-discriminatory, common carriage basis). *See also Second Report and Order*, Gen. Docket No. 84-689, 104 FCC 2d 6650, 665-666 (1986) (radiolocation is not inherently common carrier in nature under the *NARUC I* test [*National Association of Regulatory Commissioners v. FCC*, 525 F.2d 830 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976)]; common carrier obligations would impede the ability of mobile satellite service operators to tailor services to meet their customers' needs).

[62] Conference Report at 494. Similarly, the Commission will not exempt resellers of mobile-satellite service space segment capacity from the Act's common carriage requirement.

station licensees or providers who resell space segment capacity would be treated as common carrier service. We seek comment on this analysis.

**C. Regulatory Classification of Personal Communications Services**

44. In order to begin licensing of personal communications services within the statutory deadline of 270 days, the Budget Act requires us to resolve all issues relating to the regulatory status of PCS within 180 days of enactment (*i.e.*, by February 6, 1994).[63] Although we originally sought comment on these issues in GEN Docket 90-314 prior to enactment of the Budget Act,[64] we believe additional comment is called for in light of the revisions to Section 332.[65] We therefore seek comment on how the new regulatory framework under Section 332 should affect the regulatory classification of PCS. Specifically, we request comment on whether PCS should be uniformly treated as a commercial mobile service, as defined by Section 332, or whether there are also potential applications of PCS that would constitute private mobile service under the statutory definition. We urge commenters to address these issues with specific reference to both narrowband and broadband PCS.

45. We tentatively conclude that no single regulatory classification should be applied to all PCS services. As a practical matter, we expect that most broadband and many narrowband PCS services will involve interconnected service to the public or large segments of the public. We believe that a primary objective of Congress in revising Section 332 was to ensure that such services would be regulated as commercial mobile services. At the same time, we do not believe Section 332 requires the Commission to *limit* PCS to commercial mobile service applications. We have envisioned PCS as potentially providing a diverse array of mobile services, which could include applications that are not interconnected to the public switched network or are not offered to a substantial portion of the public.[66] If PCS were defined exclusively as a commercial mobile service, we are concerned that this potential diversity of applications would be unnecessarily restricted. We request comment on this view.

46. If we determine that PCS should be defined to include both commercial mobile and private mobile applications, we propose to allow all PCS licensees to choose whether to provide commercial mobile or private mobile service, as defined in Section 332, regardless of frequency assignment. This would allow licensees to choose the type of services they will provide based on market demand rather than based on regulatory preconditions.[67] We also note that the concept of licensee choice was supported by many commenters in Docket 90-314 prior to passage of the Budget Act. Although the statutory test on which a PCS licensee's choice would be based is now different, we believe choice remains a valid alternative under the new law.[68]

47. We request specific comment on how the self-designation options of PCS licensees should be structured. One alternative is for PCS licensees to provide one category of service or the other on a primary basis. Thus, each licensee would choose whether to be primarily a commercial mobile service provider or a private mobile service provider, and would be allowed to provide the other type of service only on a secondary basis, if at all. A more flexible alternative would be to allow PCS licensees to provide both commercial and private mobile services on a co-primary basis under a single license. For example, a licensee with a 20 MHz channel block could choose to devote 15 MHz to a wide-area interconnected service and 5 MHz to a high-speed data service for specialized customers, each of which would be classified separately. We request comment on whether these alternatives are sufficient to ensure that PCS services will be broadly available to the public, or whether additional conditions should be placed on licensee choice to prevent inefficient spectrum use. For example, should we mandate a "threshold" level of commercial mobile service to be provided by broadband and/or narrowband PCS licensees, but otherwise allow licensees to choose the type of service they will provide?

48. We believe the statute affords us the discretion to adopt the more flexible approach discussed above. Nevertheless, such an approach raises a variety of practical issues. How should we process applications by prospective licensees who propose to provide both commercial mobile and private mobile service, particularly in light of the different filing procedures and fees for common and private carrier services[69] Should we allow licensees to change the nature of the services they provide, and therefore their regulatory status, during the term of the license? How do

---

[63] 47 U.S.C. § 332(c)(1)(D).

[64] *See Notice of Proposed Rule Making*, GEN Docket 90-314, 7 FCC Rcd 5676, 5712-14 (1992) (*"PCS Notice"*).

[65] In our *First Report and Order* addressing the narrowband PCS allocation, we deferred resolution of all issues related to regulatory status pending final disposition of the Budget Act by Congress. *First Report and Order*, GEN Docket No. 90-314, 58 Fed. Reg. 42681 (August 11, 1993). We are similarly deferring such matters in our *Second Report and Order* on the 2 GHz PCS allocation, adopted contemporaneously with this *Notice*. *Second Report and Order*, GEN Docket No. 90-314, FCC 93-451 (adopted September 23, 1993).

[66] At the same time, we have adopted basic coverage requirements for both narrowband and broadband PCS that will require licensees to provide some form of broadly available service in their license areas. We seek comment on the effect of such requirements on the regulatory classification of PCS.

[67] We have allowed licensees to select their regulatory status in other services. *Report and Order*, Multipoint Distribution Service, CC Docket No. 86-179, 2 FCC Rcd 4251 (1987) at paras. 7-16 (MDS licensees may elect common carrier or non-common carrier status for each channel); *Memorandum Opinion, Order and Authorization*, Domestic Satellite Transponder Sales, CC Docket No. 82-45, 90 FCC 2d 1238 (1982) at paras. 41, 45 (domestic satellite licensees may offer common carrier service or sell transponders on non-common carrier basis), *aff'd*, *Wold Communications v. FCC*, 735 F.2d 1465 (D.C. Cir. 1985). Self-selection by PCS licensees would differ from self-selection in the MDS and satellite transponder contexts, however, in that the determination of regulatory status would be governed by Section 332 rather than the traditional common law test of common vs. private carriage enunciated in *National Association of Regulatory Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

[68] Moreover, some of the arguments against choice made in that proceeding may carry less weight in light of the new statutory test of regulatory status. Under the previous version of Section 332, some commenters were concerned that PCS licensees could "choose" to be private carriers while essentially providing cellular-type service. The new statute makes clear that such services will be classified as commercial mobile services.

[69] In our companion rule making initiated today on competi-

we verify that licensees are complying with the requirements of Section 332?[70] We request comment on these issues, and particularly on the practical implications of establishing a flexible regulatory framework for PCS licensees.

### D. Application of Title II to Commercial Mobile Services

#### 1. Statutory Provisions

49. Section 332(c)(1)(A) requires that any person providing commercial mobile service be treated as a common carrier subject to the requirements of Title II of the Communications Act. Sections 332(c)(1)(A) and 332(c)(1)(C) authorize the Commission to promulgate regulations exempting some or all commercial mobile services from regulation under any provision of Title II other than Sections 201, 202, and 208.

#### 2. Background

50. The Communications Act, as it was adopted in 1934, applied traditional American public utility regulation to communications common carriers. Under Title II, these carriers must offer service generally and upon reasonable request (Section 201(a)), apply only reasonable rates and charges (Section 201(b)), and make no unreasonable discrimination in service (Section 202). Carriers are required to file tariffs listing their rates and regulations (Section 203) and may be subject to requirements that they obtain authorization for extensions of lines or termination of service (Section 214), file annual reports (Section 219), and conform to Commission prescribed accounting and depreciation requirements (Section 220).

51. When these obligations were first imposed there were only monopoly providers of domestic telecommunications service. Within the last few decades, however, the telecommunications industry has experienced radical changes in the technology used, the services available, and the marketplace for these services. Responding to these changes, the FCC has increasingly adopted policies reflecting a view that open entry and competition often bring greater benefits to customers and society than traditional regulation of a market limited to one or few carriers. This has proven particularly true in the case of interexchange services. In its *Competitive Carrier* docket, the Commission classified the traditional carriers, such as the local exchange carriers and AT&T, as dominant carriers subject to full Title II regulation; new entrants were classified as nondominant. Because these emerging carriers lacked market power to control prices or to discriminate unreasonably, the Commission adopted for them a policy of regulatory forbearance.[71] These carriers were not required to file tariffs under Section 203 of the Act and were not subject to certain Commission regulations adopted pursuant to the authority of other Title II provisions. Nondominant carriers did, however, remain subject to the general common carrier obligations of Sections 201 and 202 of the Act, and to the enforcement of these obligations by complaint under Section 208.

52. Last year, however, the U.S. Court of Appeals for the D.C. Circuit found the Commission's forbearance policy of permissive detariffing to be inconsistent with Section 203 of the Act.[72] Congress subsequently revised Section 332 of the Act both to require that all providers of commercial mobile services be treated as common carriers and to give the Commission specific authority to forbear from applying the provisions of Title II to such carriers, except for Sections 201, 202, and 208. Revised Section 332 sets out three specific conditions the Commission must meet in order to forbear from applying Title II to commercial mobile services or providers. In this Notice, we state our views and tentative conclusions on Title II forbearance for these carriers and request comment on these conclusions.

#### 3. Discussion

##### a. Disparate treatment of commercial mobile services and providers

53. Section 332(c)(1)(A) states that a commercial mobile service provider shall "be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that *service or person.*" [emphasis added]. According to the Conference Report, "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section."[73] Additionally, the Conference Report explains that "the purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this provision does not alter the treatment of all commercial mobile services as common carriers, this provision

---

tive bidding procedures, we have proposed that PCS applicants seeking to provide commercial mobile service would file an FCC Form 401, applicants seeking to provide private mobile service would file Form 574, and applicants seeking to provide both types of service would file both forms. *See Notice of Proposed Rule Making,* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, FCC 93-455 (adopted September 23, 1993).

[70] In general, we anticipate that licensees who provide private mobile service would be required to demonstrate at the licensing stage that their service complies with the statutory definition. In all cases, the Commission would retain authority to review and make the ultimate determination as to the licensee's regulatory status.

[71] *Notice of Inquiry and Proposed Rulemaking,* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice); First Report and Order,* 85 FCC 2d 1 (1980) (*First Report); Further Notice of Proposed Rulemaking,* 84 FCC 2d 445 (1981); *Second Further Notice of Proposed Rulemaking,* FCC No. 82-187, 47 Fed Reg. 17.308 (1982); *Second Report and Order,* 91 FCC 2d 59 (1982) (*Second Report), recon.,* 93 FCC 2d 54 (1983); *Third Further Notice of Proposed Rulemaking,* 48 Fed Reg. 28,292 (1983); *Third Report and Order,* 48 Fed. Reg. 46,791 (1983); *Fourth Report and Order,* 95 FCC 2d 554 (1983), *vacated, AT&T v. FCC,* 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied,* January 21, 1993; *Fourth Further Notice of Proposed Rulemaking,* 96 FCC 2d 922 (1984); *Fifth Report and Order,* 98 FCC 2d 1191 (1984), *recon.,* 59 Rad. Reg. 2d (P&F) 543 (1985); *Sixth Report and Order,* 99 FCC 2d 1020 (1985), *rev'd, MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985).

[72] *AT&T v. FCC,* 978 F.2d 7272 (D.C. Cir. 1992), *rehearing en banc denied,* January 21, 1993, *cert. denied* S. Ct. Docket # 92-1684, 1993 Lexis 4392, _____ U.S. _____, 61 U.S.L.W. 3853 (June 21, 1993).

[73] Conference Report at 491.

permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier."[74]

54. We tentatively conclude that this section authorizes us to establish classes or categories of commercial mobile services and to promulgate regulations that vary among such classes. In addition, we tentatively conclude that this section authorizes us to establish regulatory requirements that differ for individual service providers within a class. We invite comment on these tentative conclusions.

55. We also seek comment on the service categories or classifications, if any, that we should establish for purposes of exercising our discretion under this section. We recognize that, in order to categorize commercial mobile services by type of service, the Commission must first resolve the issues discussed in an earlier section of this Notice regarding the definition of commercial mobile services and the services encompassed by the definition. Moreover, any final classification of commercial mobile services for purposes of exercising our authority under Section 332(c)(1)(A) will also be influenced by our conclusions relating to Sections 332(c)(1)(A)(i) through (iii), and Section 332(c)(1)(C). At this stage of our rulemaking, however, we nevertheless can tentatively conclude that the services that ultimately may be found to be commercial mobile services fall into three basic categories: certain common carrier mobile services; certain PCS services; and certain private mobile services. We invite comment on these categories and whether our regulation of the services in each should vary by category or within each category.

**b. Commission forbearance authority and the public interest test**

**(i) Legislation**

56. Under Section 332(c)(1)(A) the Commission may determine that the provisions of Title II of the Act need not be applied to some or all commercial mobile services providers except that the Commission may not forbear from applying Sections 201, 202, and 208. These latter sections require carriers to provide service upon reasonable request and upon reasonable terms (Section 201), forbid unjust or unreasonable discrimination (Section 202), and require the carrier to interconnect with other carriers upon order of the Commission (Section 201(a)). These obligations may be enforced by forfeitures (Sections 202(c) and 503(b)) or complaint (Section 208).

57. Section 332(c)(1)(A) permits the Commission to forbear from imposing a section of Title II upon some or all commercial mobile service providers only if the following determinations are made:

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.

As part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile services. . . ."

58. In the following paragraphs, we invite comment on several issues relevant to our decision to exercise the forbearance flexibility granted by Congress. For each Title II provision, the Commission must make the three-pronged determination required by Section 332(c)(1)(A). Therefore, the discussion reviews briefly the provisions of Title II and invites comment on the issues raised in making the Section 332(c)(1)(A) determination for particular statutory provisions.[75]

59. Pursuant to Section 332(c)(1)(C), the third prong of the statutory determination described by Section 332(c)(1)(A) must include consideration of whether forbearance would promote competitive market conditions, including competition among commercial mobile service providers. Commercial mobile service providers may provide three different kinds of telecommunications service for which they face competitors other than each other. Like local exchange carriers, mobile service providers may provide service that originates and terminates within a telephone exchange service area, as that term is used in Section 3(r) of the Communications Act. Our consideration of this prong thus may require an analysis of the impact of forbearance on competition in several areas. First, commercial mobile service providers may compete for end users with landline local exchange carriers. Second, such mobile service providers may also compete with landline local exchange carriers in the provision of access service to interexchange carriers.[76] Finally, commercial mobile service providers may provide interexchange service directly to end users in competition with traditional interexchange carriers like AT&T, MCI or Sprint. Therefore, commenters responding to the discussion of individual statutory provisions in the following paragraphs should address the impact of forbearance on the competitive conditions for each of these services.

**(ii) Forbearance from regulation**

60. The first two prongs of the test in Section 332(c)(1)(A) require the Commission, before it forbears, to determine that enforcement of the forborne section: (1) is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; and (2) is not necessary for the protection of consumers. We request comment on the definition of "consumer." We also invite comment on what information the Commission should consider when performing these evaluations. We ask commenters to apply this test when evaluating whether forbearance is appropriate for any provision of Title II.

---

[74] *Id.*

[75] The Conference Report also indicates that once the Commission has determined whether a rule should apply, it may revisit that determination if "after analyzing the market conditions for commercial mobile services, . . . application of such provision would promote competition and protect consumers." Conference Report at 491.

[76] *See* 47 C.F.R. Part 69.

61. The third prong of the test in the legislation, reflecting the importance of market conditions in evaluating the public interest, is similar to the evaluation that the Commission has applied in the past where making a determination as to whether forbearance from tariff regulation is appropriate. In *Competitive Carrier*, the Commission found that market conditions were generally sufficient to ensure the lawfulness of rate levels and rate structures of carriers who lacked market power. Removing or reducing regulatory requirements also would tend to encourage market entry and lower costs. The Commission determined that if nondominant carriers attempted to charge unreasonable rates, in violation of Section 201(b) of the Act, or to discriminate unreasonably in violation of Section 202(a) of the Act, customers would simply move to other carriers.[77] The Commission concluded that marketplace forces could and would generally prevent unlawful behavior and, therefore, forbearance from mandatory tariff regulation for these nondominant carriers would not harm consumers and would otherwise serve the public interest.[78]

62. Our tentative view is that the level of competition in the commercial mobile services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users.[79] In the *PCS Notice*, the Commission made some observations as to the types of services with which PCS will compete. The Commission commented that PCS providers "will be subject to substantial competition, both from other PCS services.... and from the wide range of radio-based services currently offered: cellular services, specialized mobile radio services, paging services, wireless in-building services, cordless phones, and others."[80] The Commission tentatively concluded that regardless of whether PCS is determined to be a private or common carrier service, there will be no monopoly service provider, therefore reducing the need for government to protect customers from abuses stemming from market power.[81] As a result, the Commission tentatively concluded that PCS should be subject to minimal regulation.[82] As PCS will be in competition with the services identified above, we seek comment on whether the public interest, as identified above, will be served by forbearance from Sections 203, 204, 205, 211 (Filing of Contracts) and 214 of Title II for those PCS services that are ultimately deemed to be commercial mobile services. Of course, even with forbearance, complaints could be filed under Section 208.

63. In reviewing the status of competition in the cellular market, we look to comments that we have received in response to a petition for rulemaking filed by CTIA. In that petition, CTIA requested that the Commission identify its policy on the federal tariff obligations of cellular carriers.[83] We hereby incorporate by reference the comments filed in that proceeding. The record filed in response to the CTIA petition supports our tentative conclusion that commercial mobile services may be sufficiently competitive to permit us to forbear from regulating the rates for these services. This tentative conclusion is buttressed by the coming entry of new PCS commercial mobile service providers. We also note that few states have seen the need to regulate cellular rates. Domestic public land mobile carriers, which are primarily providing paging services, have already been declared nondominant by the Commission in their provision of interstate services.[84] In addition, carriers currently classified as private carriers that may be reclassified as commercial mobile service providers as a result of this rulemaking are unlikely to have market power that would require us to regulate them differently from other commercial mobile service providers. We invite comment on whether the public interest would be served by forbearance from application of Sections 203, 204, 205, 211 and 214 of Title II to commercial mobile service providers. We also ask commenters to address whether there are any other concerns that should be addressed before we can forbear from applying these sections of Title II.

64. Some commercial mobile service providers will be affiliated with dominant common carriers. In other circumstances, when we have refrained from regulating certain services provided by affiliates of dominant common carriers, we have imposed safeguard requirements on the dominant common carrier to ensure that it does not act anticompetitively.[85] We seek comment on whether we should impose any similar requirements on dominant common carriers with commercial mobile service affiliates.

65. While the statute addresses forbearance and Title II generally, all sections of Title II do not share the same functions. Title II encompasses a variety of subjects. Several sections concern matters of Commission authority and obligations placed on carriers.[86] We tentatively conclude that we should forbear from adopting or enforcing regulations pursuant to the authority of these sections for any

---

[77] *See Competitive Carrier Notice*, 77 FCC 2d at 334-38; *First Report*, 85 FCC 2d at 31.

[78] *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59; *First Report*, 85 FCC 2d at 1-12; *Second Report*, 91 FCC 2d at 59-73.

[79] We do not, however, propose in this *Notice* to modify regulation of United States international services under Title II.

[80] *PCS Notice*, 7 FCC Rcd at 5712.

[81] *Id.*

[82] *Id.*

[83] *See* Cellular Telecommunications Industry Association (CTIA), Petition for Rulemaking, RM No. 8179, filed January 29, 1993.

[84] *See Preemption of State Entry Regulation*, 59 RR 1518 (1986), *remanded, National Association of Regulatory Utility Commissioners v. FCC*, No. 86-1205 (D.C. Cir. March 30, 1987), *aff'd, Preemption of State Entry Regulation in the Public Land Mobile Service*, 2 FCC Rcd 6434 (1987), *citing Competitive Carrier, First Report and Order*, 85 FCC 2d 1, 20-22 (1980), and *Fifth Report and Order*, 98 FCC 2d 1191 (1984).

[85] *See* 47 C.F.R. §§ 32.27, 64.902; Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom., Southwestern Bell Corporation v. FCC*, 896 F.2d 1978 (D.C. Cir. 1990).

[86] Section 210 (Franks and Passes); Section 212 (Interlocking directorates -- Officials Dealing in Securities); Section 213 (Valuation of Carrier Property); Section 215 (Transactions Relating to Services, Equipment, and So Forth); Section 218 (In-

commercial mobile service provider. We invite comment on this tentative conclusion and ask commenters to respond on a section by section basis.[87]

66. The Commission has, in the past, forborne from issuing regulations pursuant to Section 220 (Accounts, Records, and Memoranda; Depreciation Charges), thus refraining from prescribing accounting systems for all types of carriers.[88] We tentatively conclude that such forbearance is appropriate here. We seek comment on this tentative conclusion.

67. Section 206 (Liability of Carriers for Damages), Section 207 (Recovery of Damages) and Section 209 (Orders for Payment of Money) are provisions associated with the complaint remedy described in Section 208, from which the Commission may not forbear. We tentatively conclude that there is no record, at this time, to support the Commission forbearing from enforcing any of these sections for any commercial mobile service provider and that forbearance would not be consistent with the public interest. For similar reasons, we also tentatively conclude that we should not forbear from applying Section 216 (Application of Act to Receiver and Trustees) and Section 217 (Liability of Carrier for Acts and Omissions of Agents). We invite comment on these tentative conclusions.

68. Sections 223 (Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications), 225 (Telecommunications Services for Hearing-Impaired and Speech-Impaired Individuals), 226 (Telephone Operator Services (TOCSIA)), 227 (Restrictions on the Use of Telephone Equipment (auto dialing, telemarketers) and 228 (Regulation of Carrier Offering of Pay-Per-Call Services) are provisions of more recent origin and contain specific protections for consumers. We seek comment on whether the Commission should forbear from applying Sections 223,[89] 225, 226, 227, and 228 to commercial mobile service providers generally, or to any specific commercial mobile service providers in particular.

### E. Other Issues

#### 1. Right to Interconnection

69. In its new form, Section 332(c)(1)(B) requires the Commission to order a common carrier to interconnect with a commercial mobile service provider on reasonable request. In addition, new Section 332(c)(1)(B) states that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to . . . [the Communications] Act." Thus, the statute neither limits nor expands the Commission's authority to order interconnection pursuant to Section 201 of the Act.

70. We seek comment on the interconnection rights that should be afforded to commercial mobile service providers. We have previously addressed the application of our Section 201 authority to existing common carrier mobile services. For example, the Commission has required local exchange carriers (LECs) to provide the type of interconnection reasonably requested by all Part 22 licenses.[90] In the case of cellular carriers, the Commission found that separate interconnection arrangements for interstate and intrastate services are not feasible; that is, the provision of interstate and intrastate interconnection for cellular service is inseverable. Therefore, we concluded that the Commission has plenary jurisdiction over the physical plant used in the interconnection of cellular carriers. We found, however, that the costs of interconnection are severable because the underlying costs of interconnection are segregable.[91] We applied our interconnection standards to all Part 22 licensees.[92]

71. We see no distinction between the previously established interconnection rights of Part 22 licensees and those of commercial mobile service providers. That is, we tentatively conclude that in the commercial mobile context, LEC provision of interstate and intrastate interconnection and the type of interconnection the LEC provides are inseverable. Moreover, we tentatively conclude that permitting state regulation of the right to interconnect and the type of interconnection for intrastate service would negate the important federal purpose of ensuring interconnection to the interstate network. Accordingly, we propose preempting state regulation of the right to intrastate interconnection and the right to specify the type of interconnection.[93] We seek comment on this tentative conclusion. We also seek comment on whether we should require commercial mobile service providers to provide interconnection to other mobile service providers, and on whether, under Section 332(c)(3) of the Act, state regulation of interconnection rates of commercial mobile service providers is preempted. In particular, we seek comment on whether

---

quiries Into Management); Section 219 (Annual and Other Reports); and Section 221 (Special Provisions Relating to Telephone Companies).

[87] Sections 222 (Competition Among Record Carriers) and 224 (Regulations of Pole Attachments) do not appear to apply to commercial mobile services so a determination concerning forbearance is not required.

[88] Elimination of Part 34, Uniform System of Accounts for Radiotelegraph Carriers, and Part 35, Uniform System of Accounts for Wire-Telegraph and Ocean-Cable Carriers, of the Commission's Rules and Regulations, and Elimination of Annual Reports Form R, for Radiotelegraph Carriers, and Form O, for Wire-Telegraph and Ocean-Cable Carriers and Amendment of Part 1 and Part 43 of the Commission's Rules, CC Docket No. 92-145, 8 FCC Rcd 4318 (1993).

[89] *Cf.* Petition for a Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilnet Are Not Subject To The Telephone Operator Consumer Services Improvement Act of 1990, File No. MSD-92-14, DA No. 93-1022, (Com. Car. Bur. Aug. 27, 1993) (Bureau found that the petitioning cellular licensees are aggregators and therefore subject to the requirements of TOCSIA).

[90] *Interconnection Order*, 2 FCC Rcd at 2913.

[91] *Id.* at 2911-2912.

[92] *Id.* at 2913.

[93] *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Maryland Public Service Comm'n v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Public Utility Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *Illinois Bell Telephone Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989); *North Carolina*

any or all classes of PCS providers of commercial mobile service should be subject to equal access obligations like those imposed on LECs.[94]

72. We also request comment on the interconnection rights of existing mobile services that will be classified as private mobile service providers. It is well settled that the Commission has the authority to require common carriers to provide interconnection to private entities as part of our jurisdiction to regulate interstate common carrier service.[95] We find nothing in the new legislation indicating that this authority has been circumscribed, or that our existing case law extending interconnection rights to private entities is no longer valid.

73. Finally, we propose that PCS providers should have a federally protected right to interconnect with LEC facilities regardless of whether they are classified as commercial or private mobile service providers, and that inconsistent state regulation should be preempted.[96] In our original *Notice of Proposed Rule Making* in the PCS proceeding, we advanced a similar proposal, *i.e.*, that both private and common carrier PCS providers (as then defined) would have a federally protected interconnection right and that inconsistent state regulation should be preempted. In addition, we proposed that PCS providers be entitled to secure interconnection from local exchange carriers (LECs) that is reasonable for the particular PCS system and no less favorable than that offered to any other customer or carrier.[97]

74. Commenters expressed overwhelming support for these proposals,[98] and we see no reason why the intervening amendment of Section 332 should alter their applicability. We do, however, solicit commenters' views on this point, particularly with respect to whether the new statutory definitions make commercial and private services sufficiently different that private PCS providers could receive less favorable interconnection than commercial mobile providers. In addition, commenters are asked to discuss whether we should retain our original proposal to regulate the types of PCS interconnection arrangements and the specific type of interconnection to which particular PCS providers are entitled with respect to interstate service.[99] In this regard, we request comment on whether LECs should be required to file tariffs specifying interconnection rates.

75. We believe the new legislation should not affect our original proposal that PCS providers be entitled to obtain interconnection of a type that is reasonable for the PCS system and no less favorable than that offered by the LEC to any other customer or carrier. Similarly, we continue to believe that with respect to rates for interconnection, it is not necessary to preempt state and local regulation at this time. We do propose, however, to reserve the right to consider preemption at a later time if it is demonstrated that state and local regulation is exercised in such a way as to preclude development of interstate PCS service. We seek comment on what impact, if any, the newly enacted Section 332(c)(1)(B) has on the record we have already compiled on these issues.

**2. Foreign Ownership**

76. Although revised Section 332 is generally effective as of the date of enactment, private licensees providing service prior to August 10, 1993 and private paging licensees on frequencies allocated as of January 1, 1993 will continue to be treated as private land mobile licensees for three years. Nonetheless, all reclassifiable private licensees are immediately subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act. The statute allows affected licensees to maintain the level of foreign ownership that existed as of May 24, 1993, only if they petition the Commission for waiver within six months of enactment, *i.e.*, by February 10, 1994.

77. We propose to establish the following petition procedure for affected private land mobile licensees to "grandfather" existing foreign ownership under the statute. Petitioners will be required to identify all foreign persons or entities holding an interest in the license and the per-

---

*Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[94] *See Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, 101 FCC 2d 911, *recon. denied*, 102 FCC 2d 503 (1985); *Investigation of Access and Divestiture Related Tariffs, Allocation Plan Waivers and Tariffs*, CC Docket No. 83-1145, 101 FCC 2d 935 (Com. Car. Bur. 1985). Equal access obligations have also been imposed on Bell Operating Company affiliated cellular carriers. *See United States v. Western Electric Co.*, 797 F.2d 1082 (D.C. Cir. 1986). *See also* MCI Telecommunications Corporation, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, RM-8012, filed June 2, 1992.

[95] *See, e.g., Public Utility Comm'n of Texas v. FCC*, 886 F.2d at 1327-35 (upholding FCC preemption of state regulation of intrastate interconnection of private microwave licensee and noting assumption that "creation of an interconnection right for wholly *inter* state carriage is securely within the FCC's authority") (emphasis in original); *Fort Mill Tel. Co. v. FCC*, 719 F.2d 89, 92 (4th Cir. 1983) (recognizing "right of a customer to interconnect his equipment with the interstate telephone network"); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d at 1046-1047 (Commission has statutory authority over interconnection of terminal facilities and equipment used for interstate communications); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d at 794-795 (same); *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (right of subscriber to connect equipment to a telephone); *In re AT&T, et al.*, 71 FCC 2d 1, 10-11 (1979) (recognizing right of interconnection of private interstate microwave system).

[96] Although our authority to require interconnection with PCS and private providers is a function of our jurisdiction to regulate interstate common carrier service, we wish to underscore that our interstate jurisdiction extends to the interconnection between all LECs and PCS providers, even those that operate entirely within a single state, to the extent interstate or foreign communications are conducted through such facilities. Our jurisdiction extends to "facilities and services that might be located within a single state if those facilities and services are essential or integral parts of interstate communications." *Amendment of Parts 2 and 22 of the Commission's Rules*, 93 FCC 2d 908, 920 (1983), *aff'd without opinion sub nom. NARUC v. FCC*, No. 83-1485 (D.C. Cir. 1977. *See also California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) ("The key issue . . . is the nature of the communications which pass through the facilities, not the physical location of the lines.") (citation omitted).

[97] *See PCS Notice*, 7 FCC Rcd at 5714-5716.

[98] *See, e.g.*, GEN Docket 90-314, Comments of Adelphia Communications at 17; Comments of Concord Telephone Co. at 5; Comments of the Pennsylvania Public Utilities Commission at 5-6; Comments of the United States Department of Justice at 30-31; Comments of Paging Network, Inc. at 27; Comments of Freeman Engineering Associates, Inc. at 8.

[99] *See PCS Notice*, 7 FCC Rcd at 5715-5716.

centage ownership interest for each. Licensees will further be required to certify that the identity and level of foreign ownership described is unchanged since May 24, 1993, and to certify that no change in foreign ownership will occur in the future (other than divestiture of a foreign ownership interest to a domestic person or entity) without prior notice to the Commission. All petitions must be filed by February 10, 1994, and any licensee who files a timely petition will be allowed to continue operating until the Commission acts on its petition.

78. Because of the short period for filing petitions, we recognize that we may not finally resolve the regulatory status of some private land mobile licensees in time to put them on notice of the need to file. Nonetheless, in light of the statutory deadline, we intend to place the burden on the licensee to determine whether it is necessary to file, regardless of whether we have made a final determination that the licensee is subject to reclassification as a commercial mobile service. Licensees who fail to file a timely petition and who are later determined to be commercial mobile services will be subject to immediate enforcement of our foreign ownership restrictions. At the same time, we will not treat the filing of a petition as dispositive of the classification issue. Thus, a licensee may file a petition without prejudice to any future argument that it should be classified as a private rather than a commercial mobile service.

### 3. State Petitions to Extend Rate Regulation Authority

79. Revised Section 332(c)(3)(A) preempts state and local rate and entry regulation of all commercial mobile services.[100] Under Section 332(c)(3)(B), however, any state that has rate regulation in effect for a commercial mobile service as of June 1, 1993 may, prior to August 10, 1994, petition the Commission to extend that authority based on a showing that (1) market conditions will not protect subscribers from unjust, unreasonable, or discriminatory rates, or (2) such conditions exist and the service is a replacement for landline telephone exchange service for a substantial portion of landline telephone exchange service in the state.[101] In addition, states may petition the Commission to initiate rate regulation based on these same criteria.[102] If the Commission authorizes state rate regulation under either procedure, interested parties may, after a "reasonable time," petition the Commission to suspend the regulation.[103] We intend to establish procedures in this rule making for filing of such petitions by the states and interested parties. We seek comment on what factors should be considered in establishing such procedures.

## IV. PROCEDURAL MATTERS

### A. Ex Parte Rules -- Non-restricted Proceeding

80. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

### B. Initial Regulatory Flexibility Analysis

81. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of the policies and rules proposed in this *Notice* on small entities. The IRFA is contained in Appendix A to this *Notice*. The Secretary shall cause a copy of this *Notice*, including the IRFA, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

### C. Comment Period

82. Interested persons may file comments in this proceeding on or before November 8, 1993, and reply comments on or before November 23, 1993. For filing requirements, *see generally* 47 C.F.R. §§ 1.415, 1.419. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting materials. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. In addition, commenters are requested to submit courtesy copies to the Chief, Mobile Services Division, Common Carrier Bureau, 1919 M St., N.W., Room 644, Washington, DC 20554, and to the Chief, Land Mobile and Microwave Division, Private Radio Bureau, 2025 M St., N.W., Room 5202, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) at the Commission's headquarters at 1919 M Street, N.W., Washington, D.C.

### D. Further Information

83. For further information regarding this *Notice*, contact Peter Batacan at (202) 632-6450 or Nancy Boocker at (202) 632-0935 (Common Carrier Bureau, Mobile Services Division); Judith Argentieri at (202) 632-6917 (Common Carrier Bureau, Tariff Division); or David Furth at (202) 634-2443 (Private Radio Bureau, Land Mobile and Microwave Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

[100] This provision takes effect on August 10, 1994. Budget Act, § 6002(c)(2)(A).

[101] The Commission must complete all action on such petitions, including reconsideration, within 12 months of submission.47 U.S.C. § 332(c)(3)(B).

[102] 47 U.S.C. § 332(c)(3)(A). The Commission must allow public comment on any such petition and must grant or deny the petition within 9 months of submission.

[103] 47 U.S.C. § 332(c)(3)(B).

## APPENDIX A

### Initial Regulatory Flexibility Act Analysis

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA.

**Reason for Action**

This rule making proceeding was initiated to secure comment on various proposals for the implementation of Sections 3(n) and 332 of the Communications Act, 47 U.S.C. §§ 153(n), 332, as amended by Title VI of the Omnibus Budget Reconciliation Act. The proposals advanced herein are designed to carry out Congress's intent to establish a uniform regulatory framework for all mobile radio services.

**Objectives**

Congress has directed the Commission to implement Sections 3(n) and 332, as amended. In accordance with this directive, the Commission seeks to devise a regulatory scheme that will allow for the equitable treatment of comparable mobile services providers, as categorized under the terms of the new legislation. In turn, this will promote regulatory certainty and allow for the enhanced provision of service to the public.

**Legal Basis**

The proposed action is authorized under the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), and Sections 3(n), 4(i), 303(r), 332(c), and 332(d) of the Communications Act of 1934, 47 U.S.C. §§ 153(n), 154(i) and 303(r), 332(c), and 332(d), as amended.

**Reporting, Recordkeeping and Other Compliance Requirements**

The proposals under consideration in this Notice may impose certain new reporting and recordkeeping requirements on mobile services licensees whose regulatory status has changed from private to commercial as a result of the new legislation. The extent of this increase will depend in substantial part on the degree of Title II regulation imposed on such licensees.

**Federal Rules Which Overlap, Duplicate or Conflict with These Rules**

None.

**Description, Potential Impact, and Number of Small Entities Involved**

Many small entities could be affected by the proposals contained in the Notice. Depending on the final resolution of the issues, the regulatory classification of some existing private land mobile licensees and possibly some existing common carrier services may be changed. The full extent of these changes cannot be predicted until various other issues raised in the proceeding have been resolved. After evaluating the comments filed in response to the Notice, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

**Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

The Notice solicits comment on a variety of alternatives. Any additional significant alternatives presented in the comments will also be considered.

**IRFA Comments**

We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 82 of this *Notice*.

**Separate Statement**
**of**
**Commissioner Ervin S. Duggan**

**In Re: Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252**

In adopting a new Section 332 of the Communications Act, the Congress forged a new regulatory scheme for mobile services, which I hope will not only allow the FCC to give PCS a good start in life, but also to reconcile often conflicting and ill-fitting modes of regulating other mobile services.

Because there will be multiple licensees in the mobile services arena in the future, we need to focus our regulatory efforts narrowly. In my view, those efforts should be aimed at making commercial mobile services -- whether cellular, SMRS, or PCS -- a real success for consumers: affordable, easy to use, widely available, and rich with features. Most of this will be accomplished in the marketplace. But the FCC will have a role:

- o We can require nondiscriminatory interconnection among all providers, whether wireless or wireline.
- o We can make interconnection easier to accomplish by using our Title II regulatory powers as needed -- perhaps even requiring tariffs, if it comes to that.
- o We can promote interoperability among mobile service providers to the extent feasible, so that consumers can switch providers without necessarily switching handsets, and so that the same handset will work anywhere.
- o We can ensure that roaming arrangements are simple to accomplish and are seamless, if not invisible, from the consumer's point of view.
- o We can try to ensure that competition will be fair and vigorous.

I will be most interested in parties' suggestions for wielding the regulatory tools that Congress has provided us in the way most likely to promote the success of PCS.

Congress' decision to create a unified regulatory scheme for mobile services also suggests that it may be time to consider a suggestion I put forward tentatively in the past: consolidating the FCC's regulatory efforts into a single "Mobile Services Bureau." Such an approach could make the FCC's efforts more focused, more efficient, and bring harmony to our regulatory efforts.

# # # #

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 91-98**

In re Applications of

| | |
|---|---|
| MARY ANNE EMBREY d/b/a CLARKSVILLE RADIO | File No. BPH-890830MF |
| LISA M. JENKINS | File No. BPH-890905MA |
| KENTUCKIANA RADIO PARTNERS | File No. BPH-890905MO |
| CLARKSVILLE BROADCASTING LTD. PARTNERSHIP | File No. BPH-890905MU |

For Construction Permit for a
New FM Station on Channel 226A
in Clarksville, Indiana

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 1, 1993; Released: November 12, 1993**

1. The Board has before it the *Initial Decision*, 8 FCC Rcd 875 (1993) (*I.D.*), of Administrative Law Judge Joseph P. Gonzales (ALJ) which recommended the award of the subject Construction Permit to Mary Anne Embrey d/b/a Clarksville Radio (Embrey). Also before the Board are the exceptions and reply pleadings of the four (4) remaining parties.[1] Upon our review of the pleadings, augmented by an oral argument held September 17, 1993, the Board is constrained to remand this proceeding to the ALJ for a further hearing and a supplemental initial decision on the matters we discuss below.

2. All of Embrey's opponents contend that, at minimum, the ALJ erred in awarding to her full-time ownership/management integration credit without permitting her to be cross-examined on her proposal. All similarly decry the ALJ's denial of a request for a real-party-in-interest issue against Embrey grounded upon the actions of Keith Reising, a Greensville, Indiana broadcaster and broadcast consultant who assisted Embrey throughout.[2] By contrast, complains Clarksville Broadcasting, its own principals "were cross-examined for four and one half days, consuming 947 of the 1033 transcript pages comprising the entirety of oral cross-examination in this proceeding."[3] Because we find that, as a result of prehearing discovery, "material issues of fact cannot adequately be resolved without oral evidentiary hearing" and that "the public interest otherwise requires [such] oral evidentiary proceedings," *Comparative Hearing Process Reform (Clarification)*, 6 FCC Rcd 3403, 3404 (1991), we must agree with the exceptors that Embrey and her proposal demand "first-hand testing in the laboratory of truth." *California Broadcasting Corp.*, 98 FCC 2d 994, 1001 (Rev. Bd. 1984). Just as the Board there remanded because of significant questions left unanswered by that initial hearing record, the exceptions here disclose that Embrey may not be entitled to integration credit and that her evasive, contradictory and *prima facie* implausible deposition testimony could even reflect a more basic flaw in her application.

3. The material now before the Board can be summarized as follows. In his own name, Keith Reising, an Indiana broadcaster and a practicing broadcast consultant who owns Scientific Broadcast Company, participated actively in the Commission rulemaking proceedings that led to the allotment of this very FM channel to Clarksville. Yet, Reising himself did *not* apply for this channel, once allotted. Rather, Reising (1) contacted his "long-time" friend Embrey; (2) provided her with the application form (FCC Form 301) and very extensively assisted her in its preparation; and (3) at his *own* cost, supplied her with her engineering study and her aeronautical study.[4] Additionally, Reising located Embrey's original and replacement transmitter sites, preparing the FCC application amendment for the latter site as well. He also assisted her in securing a letter of (ostensible) financing from INB Banking Company. It is strenuously asserted by all parties (including Embrey) that Reising has received, and shall receive, no valuable consideration for any of these myriad professional services.

4. Indeed, inasmuch as Embrey allowed at her deposition that she had never set foot in any type of broadcast station and that she had not the slightest idea of what was involved in going forward with constructing or operating this proposed station, she maintained that she would need to hire a professional broadcast consultant (*other than* Reising) to assist her after she is awarded the permit. It is here, however, that Embrey's deposition testimony waxes evasive and contradictory to the point that her core credibility is put directly in issue. Commencing her deposition with the unqualified assertion that Reising would build her "transmitter and station," Embrey Dep. at 24, and "remodel" her studio (though she has no studio to "remodel"), Embrey quickly began distancing herself from Reising as the questions about their relationship grew more pointed and specific. For example, no sooner had she indicated that Reising would build her station and her studio, she abruptly denied that Reising would help her "design the studio"; she suddenly claimed that she would hire instead some other "capable consultant." *See id.*, at 27-28. She next stated that Reising's future role would be "to build the tower." *Id.*, at 28. Moreover, while readily acknowledging

[1] Q Prime Inc., captioned in the ALJ's Initial Decision, filed no exceptions. By separate *Order*, 8 FCC Rcd 3705 (Rev. Bd. 1993), the Board dismissed Q Prime's application for failure to prosecute.

[2] *See* Harris Exceptions at 7-12; Kentuckiana Exceptions at 8-14; Clarksville Broadcasting Exceptions at 13-14.

[3] Clarksville Broadcasting Exceptions at 14 n.3.

[4] Reising also hired another broadcast engineer (Peter Gerkis) to assist with Embrey's application; Embrey herself has never met or spoken with Gerkis. The record does not disclose who paid for the services of Gerkis.

that she surely needed the assistance of a professional broadcast consultant to go forward (and despite her 35-year friendship with Reising coupled with his already extensive professional work on her instant proposal), Embrey then swore that (1) she had *never* inquired of Reising *what* services Reising actually performs as a professional broadcast consultant, *see id.*, at 21-22; (2) she had *never* inquired about his out-of-pocket expenses in preparing her application; and (3) she has *never* inquired into the professional services Reising *could* provide to her, even as a *paid* consultant "because he has his own interests." *Id.*, at 29-30. Astonishingly, Embrey went so far as to depose that she never even *discussed* her Clarksville application with Reising:

> Q. Okay. And is it your testimony that you've never discussed the application with him?
>
> A. *I haven't discussed the application.* I've discussed getting the radio station.
>
> Q. You've discussed --
>
> A. Of course, he knows that I have applied for it, certainly.
>
> Q. *Have you ever talked with him about your application?*
>
> A. *No.* Just generalities.

*Id.*, at 38 (emphasis added). *But see id.*, at 44 (emphasis added), where Embrey shortly thereafter conceded:

> Q. Okay. And did Mr. Reising help you fill out the application?
>
> A. *Yes, he did.*

She relied heavily on Reising, she then explained, because she had no attorney or available expertise *other than* Reising. *Id.* Nevertheless, the ALJ declined her opponents' requests to question both Embrey and Reising at the upcoming evidentiary hearing, and the ALJ accepted without any further exploration Embrey's direct-written case. Based solely thereon, she was awarded the permit. *See I.D.*, paras. 5-7; 56.[5]

5. *Discussion.* The Board is quite aware that cross-examination is not an absolute right, but a prerogative that in the first instance rests with the discretion of the presiding ALJ. *Deep South Broadcasting Co. v. FCC*, 347 F.2d 459, 463 (D.C. Cir. 1965); *see also Comparative Hearing Process Reform, supra* (ALJ should not automatically require cross-examination). At the same time, significant questions of fact having public interest impact must not be left unresolved. *Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991). It is obvious that Embrey's deposition testimony regarding Keith Reising begs a multitude of questions, and her apparent contradictions relevant thereto must be confronted on the record. As we reiterated in *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6844 n.6 (Rev. Bd. 1991):

> the Commission has held that truthfulness and full candor are as much expected in discovery as they are with respect to submissions to the Commission itself. *See Washington's Christian TV Outreach*, 99 FCC 2d 395, 400-401 (Rev. Bd. 1984)(subsequent history omitted); *WNST Radio*, 70 FCC 2d 1036, 1043 (Rev. Bd. 1978)(quoting *Publix Television Corp.*, 36 FCC 1215, 1219 (1964)).

We remand Embrey's application so that her testimony may be fully examined under appropriate truthfulness issues (*i.e.*, misrepresentation and lack of candor). While we do not here and now designate a real-party-in-interest issue against Embrey, the ALJ reserves the routine right to add that issue, should the evidence adduced under the truthfulness issues warrant that additional issue, upon a properly supported motion or *sua sponte*.

6. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Clarksville Radio made misrepresentations or lacked candor before the Commission, and, if so, the effect thereof upon its basic qualifications.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[5] In fact, the *I.D.* nowhere mentions Keith Reising or his roles, or discusses the matters raised in the exceptions.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In re:

RKZ TELEVISION, INC. CSR-3816-A
Anniston, Alabama

For Modification of Station
WJSU-TV's ADI

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 15, 1993; Released: November 3, 1993**

By the Chief, Mass Media Bureau

**INTRODUCTION**

1. RKZ Television, Inc. ["WJSU-TV"], licensee of Station WJSU-TV (CBS, Channel 40), Anniston, Alabama, has filed the captioned petition for special relief seeking to include the communities of Altoona, Attalla, Gadsden, Glencoe, Hokes Bluff, Rainbow City, Reece City, Ridgeville, Southside, and Walnut Grove, Alabama and certain surrounding unincorporated areas of Etowah County, Alabama within the Anniston, Alabama "area of dominant influence" for purposes of the cable television mandatory broadcast signal carriage rules.[1] The petition is supported by CableSouth, Inc., operator of cable television systems serving Hokes Bluff, Southside, and surrounding areas of Etowah County and Calhoun County, Alabama.

**BACKGROUND**

2. Pursuant to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in Docket 92-259*,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

---

[1] WJSU-TV initially sought also to include Albertville, Alabama within the Anniston ADI. This portion of the petition has been withdrawn.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. Section 534(h)(l)(C)(ii).

* * * * *

> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in Docket 92-259, supra,* to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

*Id.* at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel postion rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

**MARKET FACTS AND ARGUMENTS OF THE PARTIES**

8. The communities here in question are all in Etowah County, Alabama which is located within the Birmingham, Alabama ADI. The Anniston ADI consists of a single county (Calhoun) and the communities here in question are immediately to the north, approximately 26 miles from Anniston.

9. In support of its petition, WJSU-TV notes that it has historically been carried on the cable systems serving the communities in question: since 1969 in Gadsden, Glencoe, and Rainbow City; since 1973 in Altoona, Attalla, Reece City, Ridgeville, and Walnut Grove; since 1982 in Hokes Bluff; and since at least 1984 in Southside. WJSU-TV states that it "places a Grade A or better contour over all of Etowah County," and that "[v]irtually all of Etowah County lies within WJSU-TV's 35-mile zone," including Gadsden, the county's largest city, WJSU-TV's city of license. WJSU-TV further notes that it maintains a full-time news office with two full-time reporters in Gadsen, and that the station "produces three to five Gadsden/Etowah County News stories each day in each of its local news broadcasts," including a local "Crime Stoppers" project developed in conjunction with Gadsden police and the Gadsden Chamber of Commerce. WJSU-TV states that the Birmingham CBS affiliate WBMG, only reaches western Etowah County with its Grade B contour, and is not eligible for mandatory carriage in the county unless it indemnifies area cable systems for increased copyright fees, and that the systems in question do not carry the station. WJSU-TV notes that it is "significantly viewed"[11] in Etowah County, and further notes that it "receives approximately 18 percent of its total local sales from Etowah County business ...."

---

[7] H.R. Rep. 102-628, 102nd. Cong., 2nd Sess. 97 (1992).

[8] *Report and Order in Docket 92-259,* 8 FCC Rcd at 2977, 2977 n.139.

[9] 47 C.F.R. Section 76.59.

[10] *Report and Order in Docket 92-259,* 8 FCC Rcd at 2981.

[11] For a network station to be deemed to be significantly viewed in a community or a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. Section 76.5(i). WJSU-TV has been found by the Commission to be significantly viewed in Etowah County. *Reconsideration of the Cable Television Report and Order,* 36 FCC 2d 326, 379 app. B (1972). WJSU-TV also states that 1992 Nielsen data show that WJSU-TV achieves "a 23 share in all homes and a 26 share in cable homes, with a combined net weekly circulation of 62."

## ANALYSIS AND DECISION

10. We shall grant WJSU-TV's petition. We first note that WJSU-TV demonstrates a history of carriage on the cable systems serving the communities in question. Second, WJSU-TV has shown that it does in fact provide coverage of, and service to, the communities in question. With respect to the fourth factor, WJSU-TV has documented substantial viewership in both cable and non-cable homes in the affected communities. Specifically, WJSU-TV has shown that its signal is "significantly viewed" in Etowah County. More recent data confirm the significant audiences that WJSU-TV serves in Etowah County and that it is the CBS affiliate preferred by county viewers.[12]

| | Noncable Households | | Cable Households | |
|---|---|---|---|---|
| | share | net weekly circulation | share | net weekly circulation |
| WJSU-TV (CBS, Ch. 40) | 7 | 37 | 10 | 67 |
| WBMG-TV (CBS, Ch. 42) | 4 | 24 | 1 | 6 |
| WHNT-TV (CBS, Ch. 19) | 4 | 21 | 2 | 28 |

We recognize that these data are county-based, rather than community-specific. Absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative, although not conclusive in cases of this type. In addition to these factors, WJSU-TV states that Etowah County businesses account for approximately 18 percent of the station's total local sales, and that the station maintains a full-time news office with two full-time reporters in Gadsden.

11. With respect to the third factor -- local issues and events coverage by other stations eligible for mandatory carriage on cable systems serving the communities in question -- WJSU-TV notes that the Birmingham CBS affiliate, WBMG, is not automatically eligible for mandatory carriage on Etowah County cable systems and, in fact, has not historically been carried on systems serving the communities in question. However, WJSU-TV does not address this issue with respect to Stations WBRC-TV (ABC, Channel 6) and WVTM-TV (NBC, Channel 3), both Birmingham, Alabama, nor Stations WNAL-TV (Fox, Channel 44) and WTJP (Ind. Channel 60), both Gadsden, Alabama which are eligible for mandatory carriage as market stations. Commission Forms 325 also show that the Birmingham affiliates have a history of cable carriage in the communities in question while WNAL-TV has such a history in Hokes Bluff and Southside and WTJP does in Altoona, Ridgeville, and Walnut Grove. Audience data, too, showing viewership for three of these four stations in Etowah County:

| | Noncable Households | | Cable Households | |
|---|---|---|---|---|
| | share | net weekly circulation | share | net weekly circulation |
| WBRC-TV (ABC, Ch. 6) | 26 | 82 | 18 | 87 |
| WMTV-TV (NBC, Ch. 13) | 21 | 71 | 15 | 84 |
| WNAL-TV (FOX, Ch. 44) | 14 | 47 | 2 | 27 |
| WTJP-TV (Ind., Ch. 60) | 1 | 1 | 1 | 7 |

12. WJSU-TV satisfies the first, second and forth in the 1992 Cable Act. While WJSU-TV has not fully addressed the third factor, we nonetheless conclude that it has justified its request to include the named communities within its ADI. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. In this case, because other stations do appear to serve the communities named by WJSU-TV, this enhancement factor would not appear applicable. WJSU-TV's showing on each of the other factors, however, is substantial and, even absent enhancement under the third criterion, warrants grant of its request. Therefore, for purposes of determining mandatory signal carriage obligations, we shall consider the communities of Altoona, Accalla, Gadsden, Glencoe, Hokes Bluff, Rainbow City, Reece City, Ridgeville, Southside and Walnut Grove, Alabama and surrounding areas of Etowah County, Alabama to be part of the Anniston, Alabama ADI with respect to WJSU-TV, as well as within the Birmingham, Alabama ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

## ORDER

13. In view of the foregoing, we find that grant of WJSU-TV's petition is in the public interest.

14. Accordingly, IT IS ORDERED, pursuant to Section 614(C) of the Communications Act of 1934, as amended (47 U.S.C. 534) and Section 76.59 of the Commission's Rules (47 CFR Section 76.59), That the captioned petition for special relief filed April 22, 1993 by RKZ Television, Inc. IS GRANTED. This change shall be effective in accordance with the following schedule: WJSU-TV shall notify the cable systems in question in writing of its carriage and channel postion elections (Sections 76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the

[12] Viewership data cited herein is from Arbitron, *Television County Coverage: Alabama* (Cable Controlled Counties), 1991.

release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 45 days of such notification.

15. This action is taken by the Chief, Mass Media Bureau pursuant to authority delegated by Section 0.283 of the Commission's Rules.[13]

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[13] Pursuant to the *Report and Order in Docket 92-259*, 8 FCC Rcd at 2978, n.150, the Chief, Mass Media Bureau is authorized to act on requests for the inclusion or elimination of specific communities from local markets in accordance with the factors set forth in Section 614(h)(1)(C) of the Act.

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

In Re Applications of

SCRIPPS-HOWARD BROADCASTING CO.
(Assignor)

and File Nos. BALCT-930721KQ
BAL-930721KO

ELCOM OF MEMPHIS, INC. BALH-930721KP
(Assignee)

For Consent to Assign
the Licenses for Stations
WMC TV/AM/FM, Channel 5,
Memphis, TN

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 7, 1993; Released: October 29, 1993**

By the Commission:

1. The Commission has before it the applications to assign the licenses of Memphis, Tennessee stations WMC (TV)(Channel 5, NBC) (BALCT-930721KQ), WMC(AM)(BAL-930721KO), and WMC-FM (BALH-930721KP)(together, the "Memphis Stations"), from Scripps-Howard Broadcasting Co. ("Scripps") to Elcom of Memphis, Inc. ("Elcom"). In addition, Elcom has requested a permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(b), to permit Elcom to acquire the stations. Elcom's request for a waiver and its assignment applications are unopposed.

2. The common ownership of the co-located Memphis television and radio stations by Scripps would ordinarily fall under the prohibitions of the one-to-a-market rule. Additionally, Scripps' ownership of a Memphis daily newspaper, *The Commercial Appeal*, would normally be prohibited by Section 73.3555(c) of our Rules, the newspaper-broadcast cross-ownership rule. Scripps' ownership of the stations and newspaper, however, pre-dated the establishment of these rules and was therefore grandfathered when the rules were adopted. The present transaction contemplates an assignment of only the broadcast stations, but because the grandfathered status of such combinations does not survive an assignment, Elcom has requested a waiver of the one-to-a-market rule.

3. In our *Second Report and Order* in MM Docket No. 87-7 (*"Second Report"*), 4 FCC Rcd 1741, *recon. in part*, 4 FCC Rcd 6489 (1989), we relaxed the waiver standard for cases implicating the one-to-a-market rule. In particular, we indicated that we would look favorably upon waiver applications involving radio and television station combinations in the top 25 television markets where at least 30 separately owned, operated, and controlled broadcast licensees or "voices" would survive a proposed merger.[1] We also stated that we would look favorably on waiver requests involving "failed" broadcast stations. Waiver requests not dependent on either of these two circumstances, we decided, would be evaluated on a case-by-case basis. The benefits of the proposed combination are to be weighed against any possible diminution of diversity and economic competition to determine whether, on balance, grant of the waiver request would serve the public interest.

4. In support of its waiver request, Elcom asserts that overall, the proposed transaction will provide a number of public service benefits which justify the grant of the waiver request. First, Elcom points to our conviction that common operation of radio and television stations in the same market would result in economies of scale, principally due to shared facilities and staff. *See Second Report*, at 1746-50. Elcom notes that such economies of scale are currently enjoyed by WMC AM/FM/TV, because the three stations share the same building and employ the same accounting and engineering departments. Elcom estimates that these efficiencies presently produce and would continue to produce cost savings of $220,000. That is, the stations' shared television and radio engineering management results in a savings of $50,000 per year, their shared business and financial staff results in a savings of $50,000 per year, and the common television and radio transmitter site and studio operations result in a savings of an additional $120,000 per year. In addition, Elcom calculates that maintaining common ownership results in a one-time saving of $200,000 that would be necessitated by relocating and separating either the TV or AM/FM transmitter site and studio operations.

5. Furthermore, Elcom asserts that these savings enable the stations to retain their locally-originated news, public affairs, and other informational programming, much of which would be sacrificed if the stations were forced to suffer the costs of separate operations. In addition, Elcom contends that the savings realized from joint operations permit the stations to conduct a variety of civic and community involvement activities in Memphis, such as sponsoring and promoting charitable events. Elcom points out that retention of locally-originated programming and community outreach efforts serves the public interest, in accordance with basic Commission policy.

6. With regard to the technical facilities involved, Elcom states that WMC-TV is a VHF station, WMC(AM) is a full-time Class B AM station operating on 790 kHz at 5 kw day and night (with a directional pattern at night), and WMC-FM is a Class C FM station operating on 99.7 MHz at 290 kw ERP from an antenna 910 feet above average terrain. Elcom contends that these stations are not dominant in the Memphis market, noting that the Arbitron Spring 1993 Ratings Book ranks WMC(TV) number 2 of 6 stations; WMC(AM) number 10 out of 22 total radio stations; and WMC-FM number 5 of 22 stations in the market.

7. Unlike the usual waiver request, which involves the merger of existing, separately-owned stations in a market and effects a reduction in the number of independent voices in that market, Elcom maintains that the proposed

[1] It should be noted that Memphis is ranked 39th among Arbitron television markets.

transaction will actually increase diversity. That is, the transaction involves a sale of only the AM/FM/TV combination and thus leaves the *Commercial Appeal* in Scripps' control. Elcom represents that *The Commercial Appeal* is the principal daily newspaper in the Memphis area, with a circulation in the Memphis metropolitan market of 154,641. Elcom further notes that the only other daily newspapers in the Memphis market with a circulation of at least 1% are the *Jonesboro Sun*, with a circulation of 1,003, and the *West Memphis Evening Times*, with a circulation of 8,734. Thus, Elcom contends, our approval of the waiver request will increase the number of voices in the Memphis area by splitting an existing newspaper-broadcast combination into two separate elements.

8. Elcom also argues that the levels of diversity and competition prevailing in the Memphis market are similar to those which the Commission presumes prevail in the 25 largest markets under the "top 25 markets/30 voices" standard and that the Commission's policy of promoting diversity and competition is as well served in the present circumstances as it is in the top 25 markets. Specifically, the Memphis area is served by 8 licensed and operating television stations, 34 licensed and operating radio stations, and an additional three stations--one television and two FM-- which are authorized but not yet operating. Thus, 42 operating stations serve the Memphis market, which is, Elcom asserts, substantially more than the 32 stations we found to constitute sufficient diversity when we granted a one-to-a-market waiver in *Moosey Communications, Inc.*, 8 FCC Rcd 5247 (1993). Further, the applicant points out that 42 stations represents one broadcast outlet for approximately every 21,000 persons in the Memphis market and exceeds the average number of stations in markets of comparable size.[2] If the waiver were granted, Elcom argues, there would continue to be 32 separate broadcast voices among the 42 operating stations in the Memphis market.[3]

9. Further, Elcom notes that in the *Second Report*, we identified the degree of cable television penetration as a relevant factor in assessing media diversity in a given area. *Id.* at 1753. Elcom asserts that 29 cable systems operate in the Memphis ADI, giving rise to a cable television penetration rate of 60%, which is higher than the national average of 56.4%.[4] In addition, Elcom points out that the availability of other media, such as newspapers, magazines, and VCRs, is another Commission index to diversity. *See Second Report*, at 1744. Elcom shows that the Memphis metropolitan market is served by three local daily newspapers, and nine magazines have a circulation rate of more than 5%, which is the level which we deemed to be significant in any diversity analysis. *Id.* at 1743. Further, the VCR penetration rate is 75%, which exceeds the level considered by the Commission to represent a high level of diversity in the *Second Report*. *Id.* Elcom concludes that the Memphis market enjoys a significant diversity of media voices, which would not be diminished by the present transaction. Indeed, in every area, the Memphis market either meets or exceeds a level defined by the Commission as significant, according to Elcom.

10. The Commission's long-standing newspaper-broadcast crossownership prohibition is designed to maximize the diversity of ownership and competition among media outlets in individual communities. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1977). The Commission instituted the rules prospectively and did not require the divestiture of non-egregious, pre-existing newspaper-broadcast combinations. However, we have customarily issued tax certificates as an incentive for the breakup of such combinations. *See Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 FCC 2d 1046, 1085 (1975) (subsequent history omitted). Moreover, the Commission has only waived the prohibition in rare circumstances involving clear showings that the diversity of media voices in a community would be preserved in the face of such combinations or, indeed, that diversity would be diminished in the absence of a waiver. *See Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993)*, petition for reconsideration pending. We find that, in this instance, waiving the one-to-a-market rule would clearly serve the public interest in breaking up grandfathered newspaper-broadcast combinations and in promoting diversity of local ownership and media competition. WMC-TV, AM and FM will now be separated from the common ownership of *The Commercial Appeal*, which demonstrably is the dominant daily newspaper in the Memphis area. Thus, this case is quite unlike the typical one-to-a-market waiver case in which the Commission must evaluate the competitive impact of *diminished* ownership diversity in a market. Rather, in this instance, granting the waiver enhances the diversity of media ownership in the Memphis market even though the TV-radio combinations are remaining under common ownership. Given our desire to promote diversity and competition wherever possible, we find that the unique factors present in this instance are compelling and justify the requested waiver.

11. Additional considerations that we traditionally take into account in one-to-a-market cases are also present. First, Elcom has documented economic efficencies which would be derived from an ongoing joint operation of the broadcast facilities that it proposes to acquire. Second, while the stations involved in the present transaction represent a substantial service, none of them is the dominant station in the market. In evaluating types of facilities under common ownership and operation, we are concerned with the potential impact of too powerful a combination. Compare *Kango Broadcasting, Inc.*, 5 FCC Rcd 3442 (1990). As the level of diversity and competition in a market increases, however, our concern with this aspect of a proposed combination decreases, and in any event, the present case involves not a merger of separately-owned facilities, but rather the continuation of broadcast facilities already commonly owned and operated. We believe that Elcom has demonstrated levels of diversity and competition in Mem-

[2] Elcom compares this service to New York, where there is one broadcast outlet for approximately every 213,000 persons, and to Portland, Oregon, where there is one broadcast outlet for every 31,000 persons.

[3] In addition, Elcom maintains that 18 stations licensed to adjacent markets compete effectively in the Memphis market, bringing the actual total of separate broadcast voices in the Memphis market to 50.

[4] In addition, the Memphis area is allegedly served by other operational video services, namely three LPTV stations, two instructional television stations, and one MDS station. Four other LPTV stations are authorized but not yet operational, according to Elcom.

phis which allay substantially the concern we might have over the continued common ownership of the facilities it proposes to control. Specifically, Elcom has demonstrated that the number of separately owned radio and television stations exceeds the 30 voice aspect of the "top 25 markets/30 voice" standard the Commission uses in identifying markets presumptively entitled to a waiver of the rule. In addition, Elcom has shown an abundance of cable, print, and alternative media information sources in each market. Moreover, the Memphis market is unlikely to change so dramatically in the future so as to change the existing levels of diversity. Finally, as referred to above, of particular import in this regard is the enhanced diversity and competition in the Memphis market that will result from the separation of the WMC broadcast facilities and *The Commercial Appeal*. Based upon the foregoing, we conclude that grant of the requested waiver is appropriate.

12. Accordingly, the request for a permanent waiver of the one-to-a-market rule, Section 35.3555(b) of our Rules IS HEREBY GRANTED, and having found the applicants fully qualified, the application for an assignment of the licenses of stations WMC AM/FM/TV ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 1, 1993**

**APPLICATION OF EX PARTE RULES TO PROCEEDINGS INVOLVING PARAMOUNT COMMUNICATIONS INC.**

Pending before the Commission are several applications for the transfer of control of the licensees of seven television stations owned by Paramount Communications Inc. (Paramount).

Initially, the following Form 315 applications for the transfer of control to Viacom Inc. (Viacom) were filed pursuant to a merger agreement entered into by those parties:

| | |
|---|---|
| BTCCT-930921KL | WTXF(TV), Philadelphia, Pennsylvania |
| BTCCT-930921KJ | WDCA(TV), Washington, D.C. |
| BTCCT-930921KK | KTXA(TV), Arlington, Texas |
| BTCCT-930921KH | KTXH(TV), Houston, Texas |
| BTCCT-930921KM | WLFL(TV), Raleigh, North Carolina |
| BTCCT-930921KI | KRRT(TV), Kerrville, Texas |
| BTCCT-930921KG | WKBD(TV), Detroit, Michigan. |

Since the filing of the applications listed above, Paramount has become the subject of separate tender offers by QVC Network Inc. (QVC) and by Viacom, which has modified its earlier merger agreement with Paramount. According to the terms of their respective tender offers, QVC and Viacom each seek to acquire a majority share of Paramount stock. In accordance with the first step of the Commission's two-step approval process for tender offers, both QVC (File Nos. BTCCT-931029KL through KR) and Viacom (File Nos. BTCCT-931029KS through KY) have filed supplemented "short form" applications, FCC Form 316, seeking special temporary authorization (STA) for their respective trustees. *See Tender Offers and Proxy Contests,* 59 R.R. 2d 1536 (1986). The STA would enable a trustee to acquire and vote, subject to certain restrictions, the stock obtained in a tender offer. The trustee of the prevailing tender offeror would exercise control of Paramount's licensed facilities pending Commission review of the second step of the process, the bidder's "long form" application, Form 315. Viacom, as noted above, earlier filed Form 315 applications. QVC filed Form 315 applications contemporaneously with its request for a STA (BTCCT-931029KE through KK).

The Paramount-Viacom Form 315 applications, the separate requests for STA, and the QVC Form 315 applications are neither mutually exclusive nor yet formally opposed, rendering them exempt at this point from *ex parte* limitations under Section 1.1204(a) of the Commission's Rules. However, in view of the expectation that these applications will be formally opposed and the interrelationship among the various applications involving Paramount, we have determined that all proceedings described above, as well as any others that may be initiated after this notice in connection with a transfer of control of the licensed facilities currently controlled by Paramount, should be restricted within the meaning of our *ex parte* rules. *See* 47 C.F.R. 1.1200(a). Accordingly, *ex parte* presentations made to or from decision-making personnel in any of the proceedings noted above are prohibited until the Commission's final disposition of all those proceedings are no longer subject to reconsideration or judicial review. Parties to any one of these proceedings shall, for purposes of the *ex parte* rules, be deemed to be parties to all of the proceedings.

This action is taken by the Chief, Mass Media Bureau.

For further information, contact Anne C. Lucey, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 88-584**

In re Applications of

| | |
|---|---|
| EDWIN A. BERNSTEIN | File No. BPH-870330NC |
| RADIO CENTER MORICHES LIMITED PARTNERSHIP | File No. BPH-870331MV |
| FRIENDSHIP COMMUNICATIONS, LTD. | File No. BPH-870415KS |
| HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP | File No. BPH-870415KY |

For Construction Permit for a
New FM Station on Channel 241A
at Center Moriches, New York

**Appearances**

*Dennis J. Kelly*, on behalf of Edwin A. Bernstein; *Howard M. Liberman* and *Gerald Stevens-Kittner*, on behalf of Radio Center Moriches Limited Partnership; *Thomas L. Siebert* and *Paul C. Besozzi* on behalf of Friendship Communications, Ltd.; and *Lewis I. Cohen* and *John J. Schauble*, on behalf of Hamptons Communications Limited Partnership.

**DECISION**

**Adopted: November 3, 1993; Released: November 12, 1993**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Member BLUMENTHAL:

1. The Board has before it the *Initial Decision*, 5 FCC Rcd 6629 (1990)(*I.D.*), of Administrative Law Judge Edward Luton (ALJ). It also has the exceptions and reply pleadings of the four (4) remaining parties.[1] Under prevailing Commission policy, the Board believes it is constrained to hold that Friendship Communications, Ltd. is the comparative winner.

**INITIAL DECISION**

2. For the reasons set forth in our *Remand Order*, 6 FCC Rcd 6841 (Rev. Bd. 1991), the Board was compelled to more critically examine the actions of (former) applicant Dakk, Inc. relating to its finances. Dakk had been selected as the original winner by the ALJ. But, not only did Dakk's obstructive actions substantially delay the resolution of this proceeding, that applicant ultimately was dismissed by the ALJ for failure to prosecute. *See supra* note 1. Of the remaining applicants, (1) Hamptons Communications is merely another in a series of fraudulent FCC applications propagated by one Jean Wells;[2] and (2) whereas neither Bernstein nor the principals of Radio Center Moriches have past local residence in the proposed service area, Friendship's "general" partner, Holly Friend, did live within the 1 mV/m service contour of the proposed station until 1983. *I.D.*, para. 48. Her past residence included some local civic activities, *see id.*, paras. 49-54, but these ended in 1979. While the contest between Bernstein and Friendship is otherwise close (both Bernstein and Holly Friend have some broadcast experience,)[3] it would seem that Ms. Friend's previous local residence -- albeit now a decade old -- gives her a slight but decisive advantage. *See generally Lorraine Walker Arms*, 6 FCC Rcd 5586, 5587 (Rev. Bd. 1991).[4] Radio Center Moriches, even if granted 100% integration credit, also lacks this past residence advantage.[5]

---

[1] The ALJ's recommended selectee, Dakk, Inc., was disqualified upon a remand. *Memorandum Opinion and Order*, 8 FCC Rcd 3056 (Rev. Bd. 1993)(no appeal taken). Another applicant, Virginia Lefebvre was earlier dismissed. *Edwin A. Bernstein*, 5 FCC Rcd 2843 (1990), *aff'd per judgment sub nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991)(table). This latter litigation also delayed this case.

[2] For more on Ms. Wells, *see Garden State Broadcasting Limited Partnership v. FCC*, 996 F.2d 386 (D.C. Cir. 1993); *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374 (Rev. Bd. 1990); *review denied*, 6 FCC Rcd 2497 (1991), *recon. dismissed*, 7 FCC Rcd 658 (1992). As in *Poughkeepsie*, Ms. Wells here again conjured a bogus two-tiered limited partnership, *see I.D.*, paras. 66-83, 92-97, and the ALJ properly rejected her blatant fraud. In fact, even if we did not agree that Hamptons must be rejected for a patent lack of *bona fides*, *see Marlin Broadcasting of Central Florida v. FCC*, 952 F.2d 507, 511 (D.C. Cir. 1992), Hamptons could not be found qualified without overcoming a character issue against it, based on the prior abusive conduct of Ms. Wells. For all practical purposes, Hamptons need be given no further consideration, and shall receive none.

[3] *Compare I.D.*, paras. 7-8 (Bernstein) *with id.*, paras. 59-63 (Friend).

[4] Both Bernstein and Friend propose to move to Center Moriches if awarded the permit, but credit for such promises is slight. *Gloria Bell Byrd*, FCC 93-460, released Oct. 1, 1993, at paras. 19-22.

[5] While two of the three "general" partners of Radio Center Moriches also have cognizable broadcast experience, we refrain from affirming the award of 100% integration credit because of the failure of two of its partners, Marc M. Weissman and Richard Weissman, to prove on this record their entitlement to full-time integration credit. Each currently holds full-time employment and each merely promises to "reduce" the time now spent on their occupations to "no more than ten hours per week." *See I.D.*, paras. 13, 20. These bare parol promises are insufficient. *See, e.g., Gloria Bell Byrd, supra* note 4, at para. 4 (and cases cited therein).

3. Our selection of Friendship as that applicant entitled to the weightiest credit under the Commission's comparative policy and case law precedent, however, must be qualified by the caveat we voiced in *Chester Associates*, 2 FCC 2029 (Rev. Bd. 1987).[6] As in *Chester*, Friendship is a limited partnership composed of a wife and husband, Holly and Warren Friend. He owns 80% of the equity, but is designated as a "limited" partner; she is designated as the sole "general" partner, with the remaining 20% equity. They were not married when the application was filed in April 1987,[7] just "friends." Though she initially contributed only $100 as her capital contribution, it is claimed that "[t]he hearing fee and subsequent expenditures came from joint funds."[8] She will move back to Center Moriches, she avows, but the couple will concurrently retain their New York City residence.[9] Finally[10]:

> Ms. Friend affirmatively testified that she will *not* consult her husband on management decisions, such as personnel matters. (Tr. 709). Ms. Friend does *not* discuss her present business with him. (Tr. 710). Nor does he discuss his business, investment banking, with her. (Tr. 710).

Because of the obvious potential for abuse of limited partnership structures to artificially skew a broadcast applicant's comparative profile,

> [i]n *Attribution of Ownership*, 58 RR 2d 604, 615-620 (1985) (*on reconsideration*), the Commission revisited its original intention to rely upon compliance with the Uniform Limited Partnership Act to provide the necessary insulation between "limited" and "general" partners, and it there imposed new requirements for contractual insulation significantly beyond those of the UPLA. For example, FCC-cognizable "limited" partnership agreements must now provide that a "limited" partner cannot act as an employee of the company; cannot be a paid consultant; cannot communicate "with the licensee or the general partner on matters pertaining to the day-to-day operations of [partnership] business"; and the partnership agreement cannot give the "limited" partner control over the entry of additional "general" partners. *See id.*, at 619-620.

*Chester Associates*, 2 FCC Rcd at 2031 n.6. Given the stringency of the aforecited insulation requirements, the *Chester* Board openly solicited further guidance in the case of husband-wife limited partnerships, since it is -- at the very least -- questionable that the Commission's rigid insulation strictures can be applied meaningfully in the case of married co-owners of a broadcast property, particularly the absolute prohibition against "communications" between the married partners.[11] Whereas Holly Friend has here sworn she will not discuss station business with her husband, the 80% equity holder, and as we suggested in *Chester*, this anomalous situation may well take " *Friendship* " just a bit too far.[12] Once more, we respectfully solicit any additional Commission guidance.

4. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed June 29, 1993 by Friendship Communications, Ltd. IS GRANTED, and the amendment IS ACCEPTED for purposes of Section 1.65 of the Commission's Rules; and that the petition for leave to file information statement and request for official notice, filed February 8, 1991 and June 30, 1993 by Hamptons Communications Limited Partnership and Friendship Communications, Ltd., respectively, ARE GRANTED; and

5. IT IS FURTHER ORDERED, That the application of Friendship Communications, Ltd. (File No. BPH-870415KS) for a construction permit for a new FM station at Center Moriches, New York IS GRANTED; and that the applications of Edwin A. Bernstein (File No. BPH-870330NC), Radio Center Moriches Limited Partnership (File No. BPH-870331MV), and Hamptons Communications Limited Partnership (File No. BPH-870415KY) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

---

[6] Settled, *Order*, 4 FCC Rcd 6488 (1989).
[7] Friendship Reply to Exceptions at 4.
[8] *Id.*, at 7.
[9] *Id.*, at 10-11.
[10] *Id.*, at 10 (original emphasis).
[11] The original Friendship partnership agreement failed to include the "non-communication" provision, *id.*, at 5 n.7, but a later amendment did so. Citing *Coast TV*, 4 FCC Rcd 1786 (1989), Friendship maintains that an applicant's documentation need not have been completed by the "B" cut-off date. True enough, *see id.*, at 1788-89 (written documentation of organizational structure not required). *Cf. Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600 (1991)(organizational amendments accepted, barring prior extraordinary conditions in original limited partnership agreement). In any event, no specific exception has been taken to the ALJ's *acceptance* of Friendship's partnership amendment; thus we do not reject that amendment. *See* 47 CFR § 1.277(a).
[12] *But cf. Spousal Attribution*, 7 FCC Rcd 1920 (1992).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: November 4, 1993**

## PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR WAIVER OF NETWORK INFORMATION DISCLOSURE REQUIREMENTS OF COMPUTER III

On November 2, 1993, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX) filed a petition seeking a limited waiver of the *Computer III* requirements for network information disclosure. NYNEX argues that the waiver is necessary in order to ensure that its NYNEX Enterprise Service (NES) is offered to customers in a timely fashion.

Pursuant to a Common Carrier Bureau order granting a waiver, NYNEX offered customers the NYNEX Enterprise DSO service (NES DSO) with certain multiplexers located on customer premises included in the tariffed service. On review of the Bureau order, however, the Commission determined that the waiver should not have been granted. The Commission required NYNEX to file tariff provisions that limit NES DSO service to existing interstate NES DSO customers.

In accordance with the Commission's order, on October 18, 1993, NYNEX filed a tariff that included interface standards for the multiplexer interconnection. NYNEX requests that the Commission permit this tariff to become effective as soon as possible, and waive the six month period the network information disclosure. NYNEX states that a waiver would serve the public interest by avoiding having customers deprived of NES.

Interested parties should file comments on the petition by **November 19, 1993**, and reply comments by **November 26, 1993**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. An additional copy should be sent to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**MM Docket No. 89-543**

In re Applications of

| | |
|---|---|
| MEDIA WEST BROADCAST GROUP, INC. | File No. BPH-871110MF |
| RIO AMERICANO COMMUNICATIONS CORP. | File No. BPH-871110MM |
| OLYMPIC BROADCASTERS, INC. | File No. BPH-871110MY |
| FAHLDA BROADCASTING COMPANY, A CALIFORNIA LIMITED PARTNERSHIP | File No. BPH-871110NB |
| OLD SACRAMENTO BROADCASTING CO., INC. | File No. BPH-871110NJ |
| JAM FM LIMITED PARTNERSHIP | File No. BPH-871110NL |
| JACK L. POWELL | File No. BPH-871110NM |
| GEORGE K. FUNG | File No. BPH-871110NU |

For Construction Permit
for a New FM Station on
Channel 278A in
Sacramento, California

**Appearances**

*Michael J. Wilhelm*, on behalf of Media West Broadcast Group, Inc.; *Paul A. Zevnik*, on behalf of Rio Americano Communications Corp.; *B. Jay Baraff* and *Lee J. Peltzman*, on behalf of Olympic Broadcasters, Inc.; *David Honig*, on behalf of Fahlda Broadcasting Company, A California Limited Partnership; *Robert Lewis Thompson* and *Howard J. Barr*, on behalf of Old Sacramento Broadcasting Co., Inc.; *Stephen Diaz Gavin*, on behalf of JAM FM Limited Partnership; *David D. Oxenford, John K. Hane, III*, and *Lester W. Spillane*, on behalf of Jack L. Powell; and *Christopher D. Imlay*, on behalf of George K. Fung.

**DECISION**

**Adopted: November 3, 1993; Released: November 12, 1993**

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

Board Member BLUMENTHAL:

1. The Review Board has before it: (1) the *Initial Decision*, 7 FCC Rcd 1678 (1992) (*I.D.*), of Administrative Law Judge Edward Luton (ALJ) granting the Construction Permit application of Fahlda Broadcasting Company, a California Limited Partnership (Fahlda) for a new FM station at Sacramento, California; and (2) exceptions filed by all of the above-captioned applicants.[1]

**INITIAL DECISION**

2. The ALJ decided this case under the standard comparative issue. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). He awarded each applicant (except Olympic Broadcasters) 100% ownership/management integration credit, but preferred Fahlda based on its particular integration proposal. *I.D.*, 7 FCC Rcd at 1692-1693 ¶ ¶ 191-198.[2] In so doing, the ALJ confined his penultimate analyses to Fahlda, Jack L. Powell, and JAM FM Limited Partnership (JAM), because the other five remaining applicants received significantly less comparative credit. *See id.*, at ¶ ¶ 191-192. Fahlda, JAM, and Powell were each awarded substantial enhancements for the local residence and civic participation of their respective integrated principals: Fahlda Nelson, general partner of Fahlda; Nathaniel S. Colley, Jr., general partner of JAM; and Powell. *Id.* Fahlda and JAM, whose principals are racial minorities, were awarded substantial preferences for that status.[3] Powell, owner and manager of daytime-only station KJAY(AM) in Sacramento, was given an offsetting daytimer preference.[4] The ALJ further credited Fahlda and JAM with slight enhancements for broadcast experience over Powell, whose own broadcast experience was considered subsumed into his daytimer preference.

---

[1] Five other applicants captioned in the *I.D.* filed no exceptions and were dismissed by the Board for failure to prosecute. *Lizardo-Franich Partnership*, 7 FCC Rcd 6256 n.1 (Rev. Bd. 1992).

[2] Olympic was also assessed a media diversification demerit. On other criteria, the ALJ awarded all of JAM FM Limited Partnership's opponents a slight comparative coverage preference, *I.D.*, 7 FCC Rcd at 1692 ¶ 189; but because of the heavier weight accorded integration preferences over coverage advantages where, as here, the area already receives ample services, the ALJ properly held the coverage differences to be non-decisional. *Id.*, at 1693 n.4.

[3] At approximately the time as the *I.D.* was issued, the United States Court of Appeals for the District of Columbia Circuit held in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), that the Commission's gender preference is unconstitutional. Fahlda shall receive no such preference.

[4] The *Second Report and Order* (MM Dkt. No. 84-231), 101 FCC 2d 638, 646 (1985), establishing the daytimer preference, provides that under certain conditions, a daytime-only licensee in the same community may receive when applying for an FM station a comparative preference equal to that of local residence or minority ownership.

## CERTIFICATION

3. Following oral argument, held before the Board on August 21, 1992, we certified to the Commission two novel questions of law and policy concerning the daytimer preference: (1) whether Powell was entitled to an award of quantitative integration credit in view of his stated intention to continue as General Manager of his existing AM station for up to three years pending that station's divestiture;[5] and (2) whether Powell was entitled to the customary comparative credit for his past broadcast experience, which, he argued, greatly exceeded that necessary to qualify for the daytimer preference.[6] *See Lizardo-Franich Partnership, supra* note 1.[7] The Commission answered the certified questions in *Media West Broadcast Group, Inc.*, 8 FCC Rcd 3649 (1993), concluding (1) that AM daytimers should be free to co-manage their AM and FM stations prior to divestiture without suffering a loss of integration credit; and (2) that Powell would not receive the ordinary broadcast experience credit, such credit being wholly subsumed into his AM daytimer preference.

## DISCUSSION

4. The proceeding is once more ripe for resolution on the exceptions. In the main, they relate to the quantitative integration credit awarded JAM, Fahlda and Powell. We have examined the *I.D.* in light of the exceptions, replies, oral argument, the Commission's *Media West*, and the record. We adopt the ALJ's findings of fact, except as modified hereinbelow. Those critical exceptions that previously concerned Powell are moot in light of *Media West*.[8] Accordingly, Powell is awarded 100% quantitative integration credit, along with appropriate enhancements. Moreover, because we conclude that under Commission precedent Powell's overall integration credit is superior, we need not reach the other non-decisional exceptions of the remaining parties. *See Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2296 ¶ 3 (1991)("An agency, like a court, need not decide questions which are not relevant to its decision," quoting *Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 266 (D.C. Cir. 1960)).[9] Hence, our decisional focus, like that of the *I.D.*, is limited to Powell, JAM and Fahlda, because they alone of the remaining applicants have the highest comparative enhancement credit.[10]

5. In the wake of *Lamprecht*, and pursuant to the Commission's instructions in *Media West*, the dispositive factors here are past local residence and civic activities. The record reflects that Powell's past residence in Sacramento, and to a lesser extent the past residence of JAM's principal Nathaniel Colley, are of much longer duration than that of Fahlda Nelson. Powell has continuously resided in Sacramento since 1965, or twenty-two years before these applications were filed. *See* Powell Exh. 1, p.3. Colley was born in Sacramento (in 1956) and been domiciled there all his life, but was absent from the community from 1974-1979 as a student. JAM Exh. 3, p.2. Colley returned to Sacramento in 1979, or eight years prior to these application filings. *Id.* His residence as a child and adolescent, broken by the years of absence as a student, is entitled to a diminished weight, *see Naguabo Broadcasting Co.*, 6 FCC Rcd 4879 (1991)(subsequent history omitted); *Colonial Communications, Inc.*, 6 FCC Rcd at 2297 ¶ 10. Nelson resided in

---

[5] Under the daytimer preference criteria, an applicant must pledge to divest itself of the daytime-only station within three years from the commencement date of program test authorization for the new FM station. *See Second Report and Order, supra* note 4.

[6] To qualify for the daytimer preference, the applicant needs to have owned the daytime-only station for three continuous years prior to designation of the FM application for hearing. *Second Report, supra*. Powell has broadcast experience extending back to 1944. Powell Exh.1 ¶ 4.

[7] Our certification questions read as follows:

> (1) Whether it is mandatory, for the award of an AM Daytimer preference (and/or ownership/management integration credit), that the subject applicant pledge to substantially relinquish a significant management position at the AM station, pending divestiture; and
>
> (2) Whether, in calculating the comparative preference in cases involving an AM daytimer, the Board must treat separately and absolutely discretely the sub-elements of "best practicable service" or whether it may consider the strongest record overall in awarding a dispositive preference for "best practicable service."

[8] Two extraneous exceptions have been raised concerning Powell. Rio Americano asserts that Powell should receive no integration credit because he allegedly did not have an Equal Employment Opportunity Program at the radio station he owned and managed; and George Fung suggests that Powell will not effectuate his integration proposal at the FM station because of age. Powell was 68 at the time of the hearing. Both exceptions must be denied. Rio Americano has not provided any factual record support or legal precedent to support its position. As for Fung's exception, the mere assertion of age as a bar to credit provides no legal basis for rejecting an integration proposal. *See Safe Broadcasting Corp.*, 6 FCC Rcd 6548, 6551 ¶ 20 (Rev. Bd. 1991)(subsequent history omitted).

[9] In addition to the exceptions concerning integration, Olympic, Powell, and Fahlda challenge various Commission or judicial pronouncements and policies; *i.e.*, the Commission's comparative criteria; the minority preference; the elimination of the gender preference; and the award of daytimer preferences. These are beyond the purview of our authority. *See, e.g., Horne Industries, Inc.*, 53 RR 2d 1647 (1983)(Board has no authority to make or modify Commission policy or Court holdings).

[10] Thus, Rio Americano's sole shareholder, Richard Ibarra, has minority ownership, past community residence and non-managerial broadcast experience. But Rio lags behind Powell because, on the factor of residence/civic participation, Ibarra was absent from the service area for 9 years before the applications were filed and his claimed civic participation is relatively minor. *See Colonial*, 6 FCC Rcd at 2297 ¶ 10, 2298 n.8 (lengthy absence from community diminishes credit and fundraising activities accorded only minimal weight). Old Sacramento is also entitled to minority and broadcast experience credit, but its 40% principal is not a resident of the proposed service area. Tr. 986. Although Old Sacramento strives to include itself within a line of cases that awards community residence credit to principals living in a community contiguous to the community of license, *see generally Joe L. Aldridge*, 6 FCC Rcd 994, 995 (Rev. Bd. 1991) and *Richardson Broadcasting Group*, 5 FCC Rcd 6364 (Rev. Bd. 1990) (subsequent history omitted), those cases have never stood for the proposition that a principal living outside the service area may receive community residence credit. We "will not extend stated Commission policy without clear instruction." *Channel 32 Broadcasting Co.*, 6 FCC Rcd 872 (Rev. Bd. 1991). For its part, Media West conceded at oral argument that it could not prevail over Powell, if Powell received his claimed integration credit. Oral Arg. Tr. 1363. It is correct.

Sacramento from 1979 to 1990, when she moved to a community five miles outside of Sacramento. *See* Fahlda Exh. 3, p.2; *I.D.*, 7 FCC Rcd at 1683 ¶ 75.

6. As to civic participation, the *I.D.* contains detailed findings regarding Powell, Colley, and Nelson, that need not be reiterated here. *See I.D.*, 7 FCC Rcd 1683 ¶ 77; 1686 ¶ ¶ 113-122; and 1687 ¶ ¶ 130-135. Suffice it that Powell and Colley each has a record of local participation. Powell's activities, which span nearly twenty years before he filed his application, are continuous and include positions of leadership. Although Colley has been involved in a slightly greater number of activities, that involvement has been for a shorter duration and a number of the activities commenced near or after the date JAM filed its application. Also, post-filing activities are entitled to very slight weight. *See Colonial Communications*, 6 FCC Rcd at 2297 ¶ 11. Nelson also has a record of civic involvement, but the majority of her activities began shortly before (or after) the time these applications were filed. Thus, her civic involvement is entitled to less credit than that of either Powell or Colley. The Commission has previously noted that "where applicants were equal on civic participation, the applicant offering longer continuous local residence received an advantage on the combined local residence and civic participation factor that was sufficient to overcome a competing applicant's preference for broadcast experience." *Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1438 n.24 (1992), citing *Kennelwood Broadcasting Co., Inc.*, 7 FCC Rcd 520, 520 ¶ ¶ 4-5 (1992). That appears controlling here, particularly where the past broadcast records of Colley and Nelson are not impressive.[11]

7. *Final Comparative Summary.* All exceptions having decisional significance have been considered by the Board. Powell has been awarded an integration preference over JAM and Fahlda on the strength of his superior local residence.[12] While the differences between Powell and Fahlda are indeed very slight, the precedent as we read it favors Powell.[13]

8. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed March 12, April 20, July 6, October 20, and November 13, 1992, and March 19, April 12, and July 28, 1993 by Old Sacramento Broadcasting Co., Inc., and on June 16, 1992 by Fahlda Broadcasting Company, ARE GRANTED for purposes of Section 1.65 only, and the amendments ARE ACCEPTED; that the motion to dismiss, filed April 16, 1992 and supplemented on May 26 and May 29, 1992 by Fahlda Broadcasting Company IS DENIED; that the Motion For Leave To Accept Late Pleading, filed May 15, 1992 by Rio Americano Communications Corp. IS GRANTED; that the Motion To Strike "Supplement To Exceptions And Brief Of Jack L. Powell," filed July 27, 1992 by Fahlda Broadcasting Company IS DENIED, as moot in light of note 13 *supra;* that the Petition For Leave To File Supplemental Citations, filed on August 25, 1992 by Old Sacramento Broadcasting Co., Inc. and the Petition For Leave To File Responsive Supplemental Citations, filed September 1, 1992 by Jack L. Powell ARE GRANTED; that the Motion To Correct And Supplement Oral Argument, filed September 21, 1992 by Fahlda Broadcasting Company IS DISMISSED;[14] and that the motions to correct transcript of oral argument filed September 8 and 21, 1992 by Old Sacramento Broadcasting Co., Inc. and Fahlda Broadcasting Company, respectively, ARE GRANTED; and

9. IT IS FURTHER ORDERED, That the application of Jack L. Powell (File No. BPH-871110NM) for a construction permit for a new FM station at Sacramento, California IS GRANTED; and that the applications of Media West Broadcast Group, Inc. (File No. BPH-871110MF), Rio Americano Communications Corp. (File No. BPH-871110MM), Olympic Broadcasters, Inc. (File No. BPH-871110MY), Fahlda Broadcasting Company, a California Limited Partnership (File No. BPH-871110NB), Old Sacramento Broadcasting Co., Inc. (File No. BPH-871110NJ), JAM FM Limited Partnership (File No. BPH-871110NL), and George K. Fung (File No. BPH-871110NU) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

---

[11] Colley worked at a college radio station while attending Michigan, and hosted a program in 1983 on radio station KFIA, Sacramento, California. JAM Exh. 3, p.5. Nelson worked for less than two years in part-time unpaid positions with a state university television producing PSAs and working with sample surveys and reports. Fahlda Exh. 3, p.4. Each has also assisted in programming appearing on cable.

[12] All of the applicants (except Olympic) are entitled to a very slight credit for proposing auxiliary power. Powell questions whether JAM's auxiliary power proposal is *bona fide*, asserting that the evidence does not appear to show that the proposal was factored into JAM's budget. Powell Exceptions at n.12. Fahlda also charged that JAM's budget contained no proposal for auxiliary power. Fahlda Exceptions at 14. However, the record citations giving rise to the specific exceptions are ambiguous, *see* Tr. 910-912, 963, and Colley testified that there was substantial room for items not specifically outlined in its cost study. Tr. 960-961.

[13] The exceptions also contend that financial issues should have been added against JAM and Fahlda. Fahlda would also add a Section 1.65 reporting issue against JAM. In light of our disposition on the comparative rankings, however, we need not reach these non-decisional questions.

[14] *See Edwin A. Bernstein*, 6 FCC Rcd 6841, 6843 n.1 (Rev. Bd. 1991)(unauthorized pleadings dismissed).

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

**PUBLIC NOTICE**

**Released: October 29, 1993**

**Microwave assignments in the 1850 to 2200 MHz band contained in the Commission's Master Frequency File (XFS) now available on floppy disk.**

In conjunction with its decisions in GEN Docket 90-314 and ET Docket 92-9 the Federal Communications Commission is releasing an extract of microwave assignments in the 1850 to 2200 MHz band residing in the Commission's Master Frequency File (XFS) in the Enhanced Microwave Environmental Link File (EMELF) format. Also being released is documentation describing the EMELF format and a QBASIC/QuickBASIC extraction program. This program can be used to read the XFS assignment data and convert the data into a form suitable for importation into a data base management program. The data was extracted at the end of September 1993.

The floppy disks are available from the Commission's duplicating contractor, ITS, Inc. The data, documentation and program files are provided on two 3 1/2 " high-density MS-DOS formatted floppy disks in compressed format. The description of files is shown in the attached table.

For information about ordering the diskettes, contact Wilbur Thomas, General Manager, ITS, at telephone: +1 (202) 857-3800, fax: +1 (202) 857-3814.

| Name | File Size (bytes) | Description |
|---|---|---|
| DA931287.wpd | | This file in WordPerfect (v. 5.1/5.2) format. |
| 2GHzXFS.Dat (2GHzXFS.zip) | 29,157,724 | An extraction of the Commission's Master Frequency File (XFS) on a link-by-link basis for the band segment 1850 to 2200 MHz in the Enhanced Microwave Environmental Link File (EMELF) format.<br><br>**NOTE:** This file has been compressed using PKZip (v. 2.04g)[1] and spans two 1.44 MB 3.5" floppy disk, MS-DOS formatted. To un-compress, use the command "PKUNZIP b:2ghzxfs.zip [d]" where "d" is destination drive and path where placement of the file "2ghzxfs.dat" is desired. The split "2ghzxfs.zip" file found on the two floppy disks cannot be copied to a hard drive directly. The compressed file, "2ghzxfs.zip" must be unzipped from the floppy disks directly. |
| EmelfSdf.Bas | 57,442 | A QBASIC/QuickBASIC program which reads in EMELF data and outputs a subset of the extracted data in a format, Standard Defined Format (SDF), suitable for importation into a database management program, *i.e.*, dBASE III/IV, Paradox, ACCESS, *etc.* The output format is described in "EmelfSdf.wpd". The program can be edited to selected different data elements. The program provides the user with the option of outputting the data as a single file or a series of band segment files containing links for predefined band segments. |
| EmelfSdf.Dat | 57,442 | An ASCII data file which is used to run "EmelfSdf.bas" in a batch mode. Needs to be edited to reflect input/output paths and input/output file names. |
| Emelf.wpd | 99,749 | A WordPerfect (v. 5.1/5.2) document describing the Enhanced Microwave Environmental Link File (EMELF) format. |

[1] PKZIP, version 2.04g, is a compression program that can be found on many computer bulletin board systems (BBS) and requires the payment of a registration fee or can be ordered directly from: PKware, Inc. / 9025 N. Deerwood Drive / Brown Deer, WI 53223-2437 / telephone: (414) 354-8699 / Fax: (414) 354-8559 for US$47.00 plus S&H.

| Name | File Size (bytes) | Description |
|---|---|---|
| EmelfSdf.wpd | 27,707 | A WordPerfect (v. 5.1/5.2) document describing the output file structure for the program "EmelfSdf.bas". |
| Emelf.zip | | A PKZIPped file containing the following files: EmelfSdf.Bas, EmelfSdf.Dat, Emelf.wpd, and EmelfSdf.wpd |

**Warning ! ! ! At least 56 megabytes of hard drive space is required to store and process this data.**

For further information contact:

Donald Draper Campbell, Senior Electronic Engineer
Federal Communications Commission
Office of Engineering and Technology / Telecommunications Analysis Branch
2025 M Street, NW, Room 7130-K
Washington, DC 20554
tele +1 (202) 653-8113, 7:30 am to 4:00 pm eastern time.
fax +1 (202) 653-8773

Before the
Federal Communications Commission
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | FCC 93-452 |
| | ) | |
| Simplification of the Depreciation Prescription Process | ) | CC Docket 92-296 |
| | ) | |

REPORT AND ORDER

**Adopted:** September 23, 1993; **Released:** October 20, 1993

**By the Commission:** Commissioners Barrett and Duggan issuing separate statements.

TABLE OF CONTENTS


| | paragraph |
|---|---|
| I. Introduction and Executive Summary | 1 |
| II. Background | 11 |
| III. Discussion | |
| A. Simplification of the Depreciation Prescription Process | 14 |
| B. Price Cap LEC Simplification | |
| 1. The Options | |
| a. The Basic Factor Range Option | 24 |
| b. The Range of Rates Option | 30 |
| c. The Depreciation Schedule Option | 35 |
| d. The Price Cap Carrier Option | 38 |
| 2. Implementation of the Basic Factor Range Option For LECs | |
| a. Summary | 57 |
| b. Data and Procedures to be Used to Establish Ranges | 58 |
| c. Accounts for Which Ranges will be Established | 63 |
| d. Range Participation | 66 |
| e. Implementation Date for Ranges | 75 |
| f. Reviewing and Updating Ranges | 78 |

3. Related Issues

a. Price Cap Treatment of Depreciation Expense 82

b. Equal Life Group Procedures 84

c. Reserve Deficiencies 87

C. Simplification for AT&T 89

D. Simplification for Alascom 95

E. Salvage 97

IV. Ordering Clauses 100

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On December 10, 1992, this Commission adopted a Notice of Proposed Rulemaking seeking comment on four distinct proposals to simplify the depreciation prescription process.[1] We also asked whether, under any of the proposed options, we should remove one step, the determination of future net salvage, from that same process to attain even more simplification. We currently prescribe depreciation rates for 33 LECs, AT&T, and Alascom. By this Order, we adopt two of those depreciation simplification plans. We adopt a modified form of the proposed basic factor range option for the local exchange carriers (LECs) regulated under our price cap regulatory scheme and a modified form of the price cap carrier option for AT&T.[2] However, at this time, we will not adopt any of the simplification proposals for Alascom or LECs currently regulated under a rate of return regulatory scheme. We also conclude that we will not now adopt a change in the determination of future net salvage.

---

[1] Simplification of the Depreciation Prescription Process, Notice of Proposed Rulemaking, 8 FCC Rcd 146 (1992) (Notice).

[2] In so doing, we amend Section 43.43 of the Commission's Rules to reflect the changes we adopt herein. 47 C.F.R. § 43.43.

2. A total of 43 parties filed comments, reply comments, and ex parte comments.[3] Twenty-one state commissions, 6 state consumer advocates,[4] and the regulatory association, NARUC, expressed their views on the proposed simplification options. The LECs were represented by the Bell Operating Companies (BOCs), GTE, CBT, SNET, United, and the telephone association, USTA. Also, two interexchange companies, MCI and AT&T, a cable association, an accounting firm,[5] GSA, and ICA submitted comments. In all, we received comments reflecting a wide range of views from state regulators, LECs, IXCs, and consumers.[6]

3. In the Notice, we listed a number of factors that led us to open this docket. We recognized that regulatory, technological, and market changes may have dated the current depreciation prescription process. We hoped to achieve three goals in this proceeding: simplification of the process, administrative savings, and flexibility, while continuing to ensure just and reasonable tariffed rates to consumers. We therefore sought comment on four distinct depreciation simplification options: the basic factor range option, the range of rates option, the depreciation schedule option, and the price cap carrier option, discussed infra. Each option was designed to simplify and to

---

[3] Lists of the parties filing each type of pleading are contained in Appendix A. Hereinafter, parties will be referred to by the short names indicated for each in the Appendix.

[4] Four state consumer advocates filed jointly, the District of Columbia, Florida, Indiana, and Pennsylvania (the SCA). The Iowa Consumer Advocate and the Colorado Consumer Counsel each filed comments separately.

[5] Deloitte & Touche originally submitted comments favoring adoption of a modified basic factor range option. Deloitte & Touche Comments at 2-3,4. However, Deloitte & Touche later withdrew those comments. Deloitte & Touche Reply at 1.

[6] We note that CCTA filed a motion seeking leave to file its pleading late. CCTA filed its comments in this proceeding on March 11, 1993, one day after the comment deadline, but prior to the reply deadline. Also, the New Jersey Commission Staff and the South Dakota Commission filed their comments after the comment deadline, but prior to the reply deadline. Finally, the Iowa Consumer Advocate filed comments after the reply deadline. We accept these comments as part of the record in this proceeding. We believe that acceptance of these comments will enable us to make a decision that gives full consideration to the important issues in this proceeding. Moreover, we find that no party to this proceeding is prejudiced by our action. Therefore, we grant CCTA's motion, and accept the other late-filed comments as part of this record.

make less burdensome the depreciation prescription process.[7]

4. For LEC depreciation simplification, the commenters were predictably divided: the state commissions, consumer groups, and MCI urged the Commission to take a measured step like the basic factor range option, while the LECs urged the Commission to take a more dramatic step like the price cap carrier option. We received less comment on AT&T generally, but did have some implicit and explicit support for adopting the price cap carrier option for AT&T.[8] Comments on implementation issues for the options were not so clearly delineated among parties, but a general consensus among state commissions and consumer groups was to continue a tighter rein on the LECs than the LECs believed was warranted.

5. Our careful consideration of the record and our own knowledge and experience in these matters have led us to conclude that streamlining the depreciation prescription process for price cap LECs will benefit those LECs, consumers, and this Commission by reducing administrative burdens associated with this process. However, we are unable to conclude that the LECs are yet in a position that justifies a depreciation prescription process as flexible and streamlined as the price cap carrier option.[9] We therefore adopt a basic factor range approach for price cap LECs in the depreciation prescription process. In reaching our conclusion, we viewed depreciation reform on a regulatory spectrum. As circumstances for the LECs change, we will revisit this issue to consider whether LECs should be farther along that spectrum.

6. We believe, however, based on the record before us and our own knowledge and experience, that the basic factor range approach as proposed must be modified. Under the basic factor range approach we adopt today, we will: (1) over time, establish ranges for all accounts, to the extent feasible and as soon as possible; (2) establish ranges for two of the basic factors comprising the depreciation rate formula: the projection life and future net salvage estimates; (3) allow price cap LECs to use company-specific survivor curves for range accounts; (4) allow price cap LECs the flexibility, as described herein, to select basic factors from within the established ranges; and (5) require price cap LECs to continue to submit the same analyses as now required for accounts for which no ranges have been set (non-range accounts) and accounts for which the carrier's basic factors do not

---

[7] The options were not however, generally designed to change the depreciation methodology currently embodied in our rules and practice. See 47 C.F.R. § 32.2000 (g)(2) (requiring carriers to "apply such depreciation rates, ... as will ratably distribute on a straight line basis the difference between the net book cost of a class or subclass of plant and its estimated net salvage during the known or estimated remaining service life of the plant").

[8] The California Commission, GSA, and NARUC imply that this option may be appropriate for AT&T, stating that under a pure price cap system, one without sharing, the price cap carrier option has merit. California Commission Comments at 8-9; GSA Comments at 3; and NARUC Comments at 12-13. The Virginia Commission Staff expressly supports the price cap carrier option for AT&T. Virginia Commission Staff Comments at 3.

[9] We also reject the range of rates and depreciation schedule options. See infra paras. 30-37.

fall within the ranges.

7. We will not adopt any of the proposed simplification options today for the two rate of return LECs for which we prescribe depreciation rates. We find that, because of the direct relationship between depreciation expenses and rates to consumers and the general competitive position of these LECs, we must maintain our current process. While we are cognizant of the burden this process places on these carriers, we believe that, in balancing ratepayers' and carriers' interests, careful scrutiny of all the data supporting such carriers' proposed depreciation rates continues to be necessary. Again, should regulatory and/or market circumstances change, we would revisit our decision.

8. Careful consideration of the record and our own experience and knowledge also lead us to conclude that an even more streamlined and flexible depreciation prescription process is reasonable for AT&T, given its regulatory scheme and competitive position. Therefore, we adopt the price cap carrier option, modified to require some information submissions, for AT&T. We believe the additional information that we will require will aid us in our continuing evaluation of AT&T's price cap plan. Thus, under the price cap carrier approach we adopt for AT&T, in addition to the required information submissions set forth in the Notice, we will require AT&T to provide: (1) generation data; (2) a summary of basic factors underlying proposed rates by account, and (3) a short narrative supporting those basic factors, including forecasted retirements and additions, and recent annual retirements, salvage, and cost of removal.

9. We will not adopt any depreciation simplification for Alascom at this time. The Alaska interexchange market is currently in transition, as evidenced by the Alaska Joint Board's recent tentative recommendation regarding the Alaska interstate interexchange market structure.[10] We find that we cannot evaluate the appropriateness of any of our options until there is a final recommendation in that proceeding. Thus, we will defer depreciation simplification for Alascom.

10. Finally, we must address the issue of whether we plan to eliminate the future net salvage determination from the depreciation prescription process and consider it in current period accounting. We conclude that we will not change the accounting of salvage amounts based on the record before us. The record is mixed, and is replete with suggestions that there be further study of issues, such as whether current period accounting of salvage amounts is consistent with Generally Accepted Accounting Principles (GAAP), to determine if the change could and should be made. We find that delaying this simplification proceeding for further study of an accounting change is unwarranted. Therefore, we will continue to determine the future net salvage value in the depreciation process at this time.

---

[10] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Tentative Recommendation and Order Inviting Comments, 8 FCC Rcd 3684 (1993) (Tentative Recommendation).

## II. BACKGROUND

11. Pursuant to Section 220(b) of the Communications Act of 1934, as amended,[11] this Commission prescribes depreciation rates for AT&T, Alascom, and 33 LECs on a triennial basis.[12] For each carrier, the Commission prescribes a depreciation rate for each individual plant account. Depreciation expense for any individual account is calculated by applying the account's depreciation rate to the average account balance. The purpose of this process is to allocate plant costs to depreciation expense on a straight-line basis over the useful life of the plant.

12. Rates are determined by a depreciation rate formula:

$$\text{depreciation rate} = \frac{100\% - \text{accumulated depreciation}\%[13] - \text{future net salvage}\%}{\text{average remaining life}}.$$

This formula requires forecasting two parameters: future net salvage (FNS) and average remaining life (ARL). The FNS is the estimated gross salvage of plant less any estimated cost of removal.[14] The ARL is the estimated average of the future life expectancy of plant. The ARL is derived from two basic factors: a projection life and a survivor curve.

13. Because depreciation rates necessarily incorporate estimates, the Commission requires carriers to submit the underlying data supporting estimates used by carriers in developing their proposed depreciation rates. These data are carefully analyzed to ensure that the estimates are reasonable, and thus that the Commission prescribes reasonable depreciation rates. The result of this process is that a carrier typically submits a depreciation study totalling, on average, 600 pages, with approximately 20-25 pages of analyses per account. The LEC industry has claimed that the current depreciation prescription process costs $35-50 million annually, industry-wide.[15]

---

[11] 47 U.S.C. § 220(b).

[12] We prescribe new depreciation rates for approximately one-third of the carriers each year.

[13] Accumulated depreciation is the amount of plant investment that has been depreciated for a particular plant account. On average, upon retirement of plant, the accumulated depreciation will be equal to the cost of the plant less any net salvage. As is explained infra, the purpose of having accumulated depreciation as a component of the rate formula is to allow for the correction of any over or under depreciation resulting from past over or under estimates of life and salvage factors.

[14] Gross salvage is the amount a carrier receives from disposing of retired plant. Cost of removal is the cost the carrier incurs to retire plant through the removal and disposition of the plant.

[15] See Notice, 8 FCC Rcd at 147-148, para. 8 and n. 9.

## III. DISCUSSION

### A. Simplification of the Depreciation Prescription Process

#### 1. Introduction

14. As we stated in the Notice, our current depreciation process was born during the 1940's when there was no competition and little technological change in the telephone market. It evolved during a period in which the Commission regulated telephone earnings on a rate of return/rate base model. Under rate of return/rate base regulation, reasonable operating expenses are routinely passed on to ratepayers through tariffed rates. Therefore, careful scrutiny of data supporting proposed depreciation rates was necessary to ensure that ratepayers were charged "just and reasonable" tariffed rates.[16]

15. Much has changed since the early development of this depreciation prescription process. Most notably, we now regulate AT&T and the largest LECs, including 31 of the 33 LECs for which we prescribe depreciation rates, under a price cap regulatory scheme.[17] Both AT&T's and the LECs' price cap plans place caps on prices carriers may charge ratepayers, and thus attempt to replicate the restraint competition has on prices. Under our price cap plans, increased depreciation expense is not, as a general rule, passed on to ratepayers.[18]

16. In addition, the telecommunications market has changed significantly since the development and refinement of the current depreciation

---

[16] Higher depreciation rates lead to higher depreciation expenses, and thus higher prices under rate of return regulation.

[17] We note however that AT&T's price cap plan differs significantly from the LECs' price cap plan. Most notably, AT&T's price cap plan does not include a sharing obligation component. See Policy and Rules Concerning Rates for Dominant Carriers, Report and Order, and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order), recon., 6 FCC Rcd 665 (1991) (AT&T Price Cap Recon. Order), remanded in part AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992); and Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), further modified on recon., 6 FCC Rcd 4524 (1991) (ONA/Part 69 Order), petitions for recon. of ONA/Part 69 Order pending, appeals of LEC Price Cap Order affirmed sub nom. National Rural Telecom Association v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[18] The general price cap formula limits rate increases to the rise in inflation and exogenous costs offset by a productivity factor. The inflation component is measured by the Gross National Product- Price Index (GNP-PI). The exogenous costs are generally considered to be costs outside the control of the carriers that are not otherwise reflected in the price cap formula. The productivity factor is an annual productivity growth target. Depreciation costs and rates are directly affected by a carrier's plant deployment and retirement decisions, and thus are not considered exogenous.

prescription process. Not only has AT&T divested itself of the BOCs, changing the dynamics of the telephone industry, but it also faces significant competition in the interexchange market.[19] Recently, we have also seen emerging competition for LECs in certain areas of service.[20] As stated previously, we have also been told by the telephone industry that the depreciation prescription process is costly; it estimates annual costs of $35 -$50 million industry-wide.[21] In light of the regulatory and market changes, we must consider whether the current process is unnecessarily burdensome.

2. Positions of the Parties

17. Although a majority of commenters endorse the idea of simplification,[22] many express concerns about aspects of our proposed simplification options,[23] and others propose alternative simplification ideas.[24] Some parties believe simplification is unnecessary.[25] MCI argues that before simplification issues can be addressed, the Commission must consider who should bear the cost of accelerated depreciation of certain categories of plant. MCI also claims that simplification should not occur until the Commission evaluates the effectiveness of its LEC price cap plan. Specifically, MCI believes that any increased depreciation flexibility should be tied to an increase in the productivity factor.[26]

---

[19] See e.g., Competition in the Interstate Interexchange Marketplace, CC Docket 90-132, Report and Order, 6 FCC Rcd 5880 (1991), recon., 6 FCC Rcd 7569 (1991), further recon., 7 FCC Rcd 2677 (1992), pets. for recon. pending; see Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order, 8 FCC Rcd 2659 (1993).

[20] See generally Expanded Interconnection with Local Telephone Company Facilities, CC Docket 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7269 (1992), recon., 8 FCC Rcd 127 (1992).

[21] See Notice, 8 FCC Rcd at 148, para. 8 and n.9.

[22] See e.g., AT&T Comments at i; Bell Atlantic Comments at 1; CBT Comments at 1; California Commission Comments at 2; Colorado Consumer Counsel Reply at 2; NARUC Comments at 5; NYNEX Comments at 1; and Tennessee Commission Staff Comments at 1.

[23] See e.g., California Commission Comments at 1-2 (expressing doubt that significant administrative savings will result under any of the proposed options); Texas Commission Comments at 1 (expressing concern that the benefits from simplification may not outweigh the loss in data analysis).

[24] CCTA Comments at 1-2 and GSA Comments at 2.

[25] See e.g., MCI Comments at 1; and Utah Commission Comments at 1. Although these parties believe our simplification proposals are unnecessary, they nevertheless endorse one of the simplification options. See MCI Comments at 2; and Utah Commission Comments at 2.

[26] MCI Comments at 9. In reply, GTE states that while anticipated cost savings from depreciation simplification are not trivial, in the recalculation of the productivity factor, the "impact of [expected industry-wide savings]

3. Discussion

18. We conclude that simplification of our current depreciation process is warranted at this time for price cap LECs and AT&T. We disagree with those parties suggesting that, because the current depreciation prescription process yields reasonable rates, the current depreciation process should be maintained without simplification.[27] While we cannot quantify the precise dollar cost our current process imposes on carriers, we find that regulatory and market changes allow us to simplify and make the process less burdensome for price cap carriers without sacrificing protection for consumers.

19. We believe that, for telephone companies, scrutiny of depreciation rates should be most intense when a carrier is regulated primarily under a cost-plus system and faces little or no competition. At the other end of the spectrum, scrutiny of depreciation rates for telephone companies should be least intensive for a carrier facing significant competition and a less burdensome regulatory scheme than the cost-plus system. However, we must, pursuant to Section 220(b), prescribe reasonable depreciation rates for these carriers. Price cap LECs are somewhere between these two extremes because of their current regulatory model and the emerging competitive forces they now face. AT&T, on the other hand, is much closer to the end of our spectrum; again because of its regulatory model and the significant competitive forces it faces.

20. Price cap regulation allows us to reduce the level of scrutiny applied to data submitted by carriers to support their proposed rates by shifting the regulatory focus from carrier costs to prices charged ratepayers. Because price cap regulation prevents carriers from automatically recouping increased depreciation expense from ratepayers, carriers have less incentive to seek depreciation rates that are not representative of actual plant consumption.[28] Moreover, our price cap plans directly provide an added degree

---

would be hard to find." GTE Reply at 14. NYNEX claims that delaying simplification until the LEC price cap review has taken place in order to include any savings from simplification in the productivity factor is contrary to the purpose of price caps; efficiency and savings should be encouraged. NYNEX Reply at 7.

[27] We also disagree with MCI that we must defer simplification until we conduct our LEC price cap review so that we can incorporate the savings that should result from simplification into the LECs' productivity factor. MCI has presented no evidence that a change in our depreciation prescription process will have so great an impact on the LECs' productivity factor that it requires deferral of this proceeding. While we anticipate savings in the long run, we recognize that the immediate future is unlikely to produce such a significant level of savings that the productivity factor should be adjusted. We will certainly consider any evidence of the impact this savings will have on the productivity factor in the LEC price cap review.

[28] We note however that, for the price cap LECs, the incentive is not perfect because of the sharing mechanism incorporated in the LEC price cap model, see infra, para. 27, and because LECs do not yet face significant competition. For these reasons we will not adopt the price cap carrier option

of consumer protection from increased prices that rate of return/rate base regulation does not: carriers are not routinely allowed to pass along increased depreciation expense through tariffed rates to ratepayers, although the level of their sharing obligations or the need for a low-end adjustment can be affected by the level of their depreciation expense. Given the nature of our price cap plan, we thus conclude that the public interest will continue to be served with less regulatory scrutiny of data supporting proposed depreciation rates.

21. We also believe that, as carriers face increasing competitive pressures, they should have less incentive to seek depreciation rates that are not in line with company operations. For example, we believe that competitive pressures now faced by AT&T in the interexchange market offer additional protection against unreasonably high prices for ratepayers. Emerging competitive pressures in certain LEC services such as special access should offer similar protection against high prices for ratepayers as it grows more robust. Streamlining the depreciation prescription process is also in the public interest because it can reduce the costs associated with that process without reducing consumer protections. For these reasons, we believe that we can now reevaluate the level of scrutiny we apply in prescribing depreciation rates for price cap carriers.

22. The reforms we adopt for price cap LECs are not appropriate for rate of return/rate base LECs at this time. Because rate of return/rate base regulation necessarily will result in increased prices to consumers with increased depreciation rates, we conclude that adoption of any of the simplification options for rate of return LECs would not serve the public interest. Moreover, these LECs are not in such a competitive posture that there are sufficient disincentives to dissuade them from passing on to ratepayers all increased depreciation expense which may be unreasonable. We are ever cognizant of our mandate to ensure that ratepayers are charged "just and reasonable" rates.

B. Price Cap LEC Simplification

23. In this section, we evaluate each of the proposed options in terms of three goals: simplification, administrative cost savings, and flexibility. Simplification and administrative cost savings go hand in hand with our goal of reducing unnecessary burdens of the depreciation prescription process. Flexibility, however, addresses our desire to complement the LEC price cap plan we have in place to the extent possible.[29] We also are mindful that these goals must not conflict with our obligation to consider the public interest.

---

for the price cap LECs. See infra. at paras. 42-48.

[29] In this section of our Order, and the Implementation section for price cap LEC depreciation simplification, infra at paras. 57-87, any decisional language referring to "LECs" or "carriers" refers to price cap LECs only. These references should not be interpreted to include rate of return LECs.

1. The Options

a. The Basic Factor Range Option

(1) Introduction

24. As proposed, under the basic factor range option, the Commission would establish ranges for the basic factors that determine the parameters used in the depreciation rate formula: the FNS, the projection life, and survivor curve. If a carrier used basic factors from within established ranges for a range account, that carrier would not be required to submit the detailed supporting data.

(2) Comments

25. An overwhelming majority of state commissions and state consumer advocates support this option as the best proposed simplification option.[30] They argue that this option strikes the best balance between consumer and LEC interests. The LECs contend that, although this option is not as simple, flexible or savings-focused as other options, it is better than the current process.[31] CCTA opposes this option, however, stating that a range based on "averaging" will not produce basic factors reasonably representative of those currently underlying prescribed rates.[32]

(3) Discussion

26. We conclude that the basic factor range option is the most reasonable option for the LECs. It fulfills the objectives of this proceeding: simplification, savings, and flexibility. It is simpler than the current process because it eliminates the need for LECs to file and the Commission to review extensive data submissions for range accounts. We expect this approach to produce significant savings over time, especially if the state commissions implement the same or similar processes.[33] This option also has an element of flexibility because it allows a carrier to determine, within a specified reasonable range, the life and salvage factors it uses in prescribed depreciation rates without undergoing the expense of submitting

---

[30] See e.g., Idaho Commission Comments at 3; Indiana Commission Comments at 4; Michigan Commission Staff Comments at 4; SCA Comments at 12; and Wisconsin Commission Comments at 1-2. See also, Florida Commission ex parte Comments at 2; ICA Reply at 2; Iowa Consumer Advocate Reply at 1; NARUC Comments at 6; and MCI Comments at 2.

[31] See e.g., BellSouth Comments at 34; GTE Comments at 11-12; and US West Comments at 9.

[32] CCTA Comments at 14. GSA also opposes this option, arguing that ranges increase the LECs' opportunities to avoid their sharing obligation. GSA Comments at 6-7.

[33] We note that USTA estimates that this option will produce administrative savings of 31.5% if adopted for all accounts and "across all jurisdictions." See USTA comments at 8.

studies to justify its specification of those factors. For example, this option would allow a carrier to exercise its final judgment over whether, for the Conduit Systems account[34], a life of 55 years is more consistent with its operations than a life of 60 years.[35]

27. We also agree with the state commissions that this option most adequately addresses both the LECs' desire for a more streamlined and flexible process and the regulators' and consumers' concerns that there continue to be adequate oversight of depreciation, the LECs' largest single expense. As mentioned previously, the LECs' price cap plan includes a rate of return-based backstop. Under this backstop, LECs choosing a productivity factor of 3.3 must share 50% of earnings in excess of 12.25% with ratepayers (the sharing obligation).[36] Also, under this backstop, the price cap limits are raised when a LEC's earned return falls below 10.25% (the lower adjustment threshold). Without adequate oversight, LECs, by taking greater depreciation expense for any given year, could lower their rates of return, potentially moving themselves outside the sharing zone or below the lower adjustment threshold. As long as the backstop is a part of our LEC price cap plan, we must ensure that LECs cannot manipulate that mechanism to ratepayers' detriment. We do not imply, however, that the rate of return-based backstop forecloses any additional streamlining in the depreciation prescription process. If we have reason to conclude later that other forces will ensure that LECs cannot manipulate the rate of return-based backstop to ratepayers' detriment, we would revisit the issue.

28. Moreover, the competitiveness of the LECs' markets overall are not sufficiently robust to warrant any additional flexibility that might be afforded by other proposed options. Although the LECs face emerging competition in certain services, competitive pressures are not such that we can rely on them to provide an adequate check on LECs' depreciation choices. If we determine in the future that the rate of return-based backstop is no longer necessary and/or competition in the LECs' markets is sufficiently vigorous, we would be prepared to revisit this issue.

29. We reject CCTA's objection that "averaging" basic factors will not result in representative basic factors.[37] First, as described infra, carriers

---

[34] See 47 C.F.R. § 32.2441.

[35] Any factor selected by a carrier should reflect that carrier's operations. Moreover, the carrier should have support for any selected range factor. The carrier will not need to submit such data, but must maintain it.

[36] If a carrier selects a productivity factor of 4.3, the carrier begins to share with ratepayers when its earned return exceeds 13.25%.

[37] We also reject CCTA's proposal that we merely lengthen the current depreciation prescription process from three to four years. See CCTA Comments at 27-28. CCTA's proposal does not address our simplification goal. We also reject GSA's proposal that we simplify the depreciation prescription process by eliminating the three-way meeting process and prescribe depreciation rates on a holding company level. See GSA Comments at 5-6, 7-8. GSA has presented no evidence that its proposal will meet our cost savings goal more effectively than the basic factor range option we adopt today.

that initially will be allowed to use ranges must currently be using basic factors that fall within the established ranges for a specific account. If a carrier's current basic factors do not fall within the established ranges, that carrier must submit sufficient information, consistent with the current depreciation analysis requirements, to demonstrate that its basic factors should fall within the established ranges to be free from a requirement of filing supporting data. LECs would need to continue to analyze underlying basic factors to assure the reasonableness of their depreciation expense and maintain such analyses. In addition, we will consider, in the depreciation prescription proceedings, any data presented on the record that a carrier's proposed basic factors do not reflect that carrier's plans and operations.[38] Thus, carriers must use basic factors that reflect their operations in their proposed depreciation rates.

b. The Range of Rates Option

(1) Introduction

30. Under the range of rates option, the Commission would establish ranges of acceptable depreciation rates. Again, carriers would not file the extensive data submissions now required if they select rates from within the established ranges.

(2) Comments

31. With the exception of the staff of one state commission,[39] all commenting state commissions urge the Commission to reject this option.[40] Their primary objections are that this option: (1) will result in the demise of the matching principle for LECs' depreciation accounting[41] and (2) cause significant reserve imbalances.[42] MCI underscores the matching principle objection, stating that this option eliminates safeguards needed to "retain some relationship between the factors that determine an asset's depreciable life and the depreciation expense level carriers may select."[43] NARUC also

---

[38] Moreover, if a LEC is not fulfilling this obligation, we have the authority to take appropriate action against such carrier. For example, we have the authority to fine any carrier that fails or refuses to keep its books of account in the manner prescribed by the Commission. See 47 U.S.C. § 220(d). See also 47 U.S.C. §§ 220(c), (e), and (g), and 154(i) and (j).

[39] Oklahoma Commission Staff Comments at 1.

[40] See e.g., Colorado Commission Comments at 20; Missouri Commission Comments at 4; and South Dakota Commission Comments at 2. See also GSA Comments at 4-5; and MCI Comments at 8.

[41] The matching principle holds that plant costs should be allocated to depreciation expense at a rate representative of the actual consumption of plant.

[42] See e.g., Colorado Commission Comments at 20; and South Dakota Commission Comments at 2.

[43] MCI Comments at 8.

claims that "[e]stablishing a rate range based on present rates would include effects of growth, ELG, and reserve, all of which vary among companies. The result would have little meaning as an average."[44]

32. Generally, the LECs favor this option as a second choice.[45] USTA claims that the depreciation rate range option is preferable if the price cap carrier option is not adopted because the range of rates option requires establishing only one set of ranges as opposed to establishing two sets of ranges under the basic factor range option. USTA also concludes that the savings in administrative costs would be slightly greater for this option.[46] The LECs also argue that the state commissions' concerns are unwarranted. According to Southwestern, GAAP will require LECs to comply with the matching principle, and FCC rules and procedures will prevent significant reserve problems.[47]

(3) Discussion

33. We have reviewed current depreciation rates and found that, were we to adopt ranges of depreciation rates based on these current rates, in order to accommodate any significant number of carriers, the ranges would need to be so wide that effective regulatory oversight would be severely compromised.[48] Moreover, even if we could adopt ranges based on currently prescribed rates, we would eliminate the remaining life concept now embodied in our prescribed rates. We find that this is unwise.

34. Remaining life is important because it allows for the correction of any past imprecision in depreciation rates by incorporating an individual carrier's reserve ratio into its depreciation rates.[49] Under the range of rates option, remaining life would be eliminated because the ranges of rates would necessarily include an industry-wide implied reserve ratio instead of a company-specific reserve ratio. We do not believe that removing the remaining life concept from the depreciation prescription process would serve the public interest or, for that matter, the carriers' interests. Ranges of rates which incorporate an industry-wide reserve ratio would not reflect individual

---

[44] NARUC Comments at 8, n. 5. See also California Commission Comments at 4-5.

[45] See e.g., BellSouth Comments at 34; NYNEX Comments at 14; and SNET Comments at 16-17. See also, USTA Comments at 15. Bell Atlantic and United would select the basic factor range option as a second choice. Bell Atlantic Comments at 2; and United Reply at 7.

[46] USTA Comments at 16. USTA estimates administrative savings under this option to be 33.2% of costs incurred under the current process. Id. at 7.

[47] Southwestern Reply at 26.

[48] This is due to carriers' disparate reserve ratios. Reserve ratios are determined as accumulated depreciation divided by gross plant investment.

[49] Depreciation rates cannot be determined with absolute accuracy until the assets are retired because life and salvage factors are forecasts. Thus, there is necessarily an element of imprecision in the process.

companies' reserve positions and might lead to large reserve deficiencies, which place carriers at risk of not fully depreciating their plant. Although we recognized the potential for this problem in the Notice, and sought comment on whether a different mechanism could be used in place of the remaining life concept, no party to the proceeding offered a solution. Without a solution to this problem, we believe that the depreciation prescription process could become more burdensome and costly because of the potential need for Commission action in every individual case where large reserve imbalances occur. This would not fulfill our simplicity and administrative savings goals, and thus, we reject this option for the LECs.

c. The Depreciation Schedule Option

(1) Introduction

35. Under the depreciation schedule option, the Commission would establish a depreciation schedule for each plant account. The schedule would be based on a Commission-specified service life, retirement pattern, and salvage value for each account. Carriers would apply the schedule to their investment by vintage.

(2) Comments

36. The parties to this proceeding unanimously state that the Commission should reject this option. They argue that this option destroys the matching principle and provides no simplification or savings because it would require tracking plant by vintage.[50]

(3) Discussion

37. When we proposed this option, we recognized that it was more rigid than other options. However, we raised the question of whether it would be simpler because, with set depreciation schedules, carriers would have to conduct much less depreciation analysis than under any of the other options. Nonetheless, we agree with the parties that this option undermines the matching principle underlying our depreciation process. Moreover, for many of the same reasons that the range of rates option might lead to reserve imbalances, this "one size fits all" option might also lead to reserve imbalances. Thus, we reject this option for LECs.

d. The Price Cap Carrier Option

(1) Introduction

38. Under the price cap carrier option, carriers would file proposed depreciation rates with the Commission. Those rates would not be supplemented with supporting data. The Commission would propose to adopt the carriers' proposed rates and seek comment on their reasonableness. Prescription of rates would be based on the proposed rates and any comments made thereon.

---

[50] See e.g., California Commission Comments at 6-7; NYNEX Comments at 19; New York Commission Comments at 11; Pacific Comments at 15-16; US West Comments at 12; and Washington Commission Comments at 4.

(2) Comments

39. The LECs are unanimous in their support of this option.[51] They argue, both separately and collectively, that this option: (1) is the most consistent with price cap regulation;[52] (2) will result in more accurate rates;[53] (3) is necessary for carriers to be in a position to compete against new market entrants;[54] and (4) will provide an incentive for carriers to develop the infrastructure.[55] CBT, regulated under a rate of return/rate base scheme, argues that this option should be adopted for all LECs.[56] USTA supports this option but would "redefine" it.[57] USTA states that the option should: (1) require carriers to file the "major data elements" used to calculate their depreciation rates; (2) allow carriers to file for new depreciation rates no more than annually, but no less than triennially; (3) require carriers to follow the current depreciation methodology, straight-line, remaining life; (4) allow three-way meetings when beneficial; and (5) require carriers to provide states with the same information provided this Commission.[58]

40. State commissions and consumer advocates are unanimous in their opposition to this option for LECs.[59] They argue that this option: (1) provides LECs with the ability to manipulate their earnings through depreciation expense;[60] (2) would eliminate valuable data necessary to the analysis of proposed depreciation rates;[61] and (3) would eliminate the three-

---

[51] See e.g., Ameritech Comments at 5-7; SNET Comments at 12-16; US West Comments at 6-7. See also USTA Comments at 7-9 and 12-14. USTA estimates that administrative cost savings should approach 50% of current costs.

[52] See e.g., Bell Atlantic Comments at 2.

[53] See e.g., USTA Comments at 14.

[54] See e.g., Southwestern Comments at 9-10.

[55] See e.g., BellSouth Comments at 20.

[56] CBT Comments at 3.

[57] USTA Comments at 8. See also Bell Atlantic Comments at 7.

[58] USTA Comments at 10.

[59] See e.g., ICA Reply at 4; New York Commission Comments at 12; Nebraska Commission Comments at 2-3; North Dakota Commission Comments at 1-2; Oregon Commission Comments at 3; and SCA Comments at 21.

[60] See e.g., California Commission Comments at 8 and Idaho Commission Comments at 5.

[61] See e.g., Texas Commission Comments at 5; Utah Commission Comments at 4; and Wisconsin Commission Comments at 7.

way meetings.[62] Many state commissions emphasize that the three-way meeting process has been beneficial.[63] Some parties also question whether the option, as proposed, meets the legal standards imposed on the Commission by the Communications Act.[64] Essentially, these parties argue that under the price cap carrier option, as proposed, the Commission would be abdicating its mandate to "prescribe" rates and would fail to provide states a "reasonable opportunity" to present their views. Finally, some parties disagree that this option will encourage infrastructure development.[65]

41. The LECs and USTA argue that all of these concerns can be alleviated by adequate safeguards. They contend that there are adequate existing safeguards: (1) good business judgment;[66] (2) competition;[67] (3) external accounting requirements such as GAAP;[68] and (4) regulatory oversight by the SEC, this Commission and state regulators.[69] The LECs also suggest, however, that additional safeguards could be imposed. These additional safeguards include: (1) filing proposed depreciation rates in the first quarter of the year;[70] (2) requiring certification of proposed rates by independent auditors;[71] (3) imposing an annual reasonableness test for overall

---

[62] See e.g., Oregon Commission Comments at 1 and Virginia Commission Staff Comments at 1. The three-way meeting is an informal meeting held among this Commission's staff, the state commissions' staffs, and the carriers to discuss various depreciation rate proposals.

[63] See e.g., Minnesota Commission Reply at 7; Oregon Commission Comments at 1; Virginia Commission Staff Comments at 1; and Wisconsin Commission Comments at 1.

[64] See 47 U.S.C. §§ 220(b) and (i). Section 220(b) states that the Commission "shall, as soon as practicable, prescribe ... the percentages of depreciation which shall be charged [by carriers]." Section 220(i) states that the Commission "shall notify each State commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations."

[65] See e.g., CCTA Comments at 3-8; ICA Reply at 6-7; and SCA Comments at 25.

[66] See e.g., Ameritech Comments at 6-7 and Bell Atlantic Comments at 8-9.

[67] See e.g., NYNEX Comments at 8-10.

[68] See e.g., USTA Reply at Ernst & Young Report, "Depreciation Safeguards Under GAAP."

[69] See e.g., Pacific Comments at 10, 12-13 and Southwestern Comments at 12-16.

[70] See e.g., Bell Atlantic Comments at 8-9.

[71] Id. at 7-8.

depreciation expense or composite rate changes;[72] and (4) imposing an annual depreciation rate change limitation for each account.[73] These safeguards, carriers argue, will alleviate concerns expressed by the state commissions and this Commission.[74]

(3) Discussion

(i) The Price Cap Carrier Option Generally

42. We agree with the carriers that this option is simpler and provides greater flexibility than any of the other proposed options; however, we conclude that, at this time, the LECs' regulatory and market circumstances do not justify adoption of this option for them. Specifically, this option creates a significant opportunity and incentive for LECs to undermine the sharing component of our price cap plan which would not be in the public interest. Moreover, the LECs are not yet in such a competitive posture that could safely allow the degree of flexibility afforded by this option. We also are not convinced that this option will produce greater administrative savings than the basic factor range option because of the state commissions' opposition to it.

43. Depreciation expense is the LECs' largest single expense. This option would create a unique opportunity and incentive for the LECs to limit their sharing obligation through unreasonable changes in their depreciation rates and thus, their depreciation expense. Because depreciation rate changes on their face may not appear unreasonable, we cannot be assured of their reasonableness without sufficient information.[75] Unlike the basic factor range approach, this option will not provide us with sufficient information.[76] Thus, we are unable to adopt an option that incorporates this degree of opportunity and incentive for carriers to undermine a vital component of the LEC price cap plan at this time. Moreover, the LEC price cap review is scheduled to begin in the near future and the issue of sharing will be addressed therein. We do not wish to take any action here that could be

---

[72] See e.g., BellSouth Reply at 6-7. For a variation of this test, see United Comments at 6-7 (proposing a tracking system of depreciation expense changes over a multi-year time span).

[73] See e.g., BellSouth Reply at 8-9.

[74] See Notice at Concurring Statement of Commissioner Ervin S. Duggan.

[75] As United recognized, "[a] price cap LEC could use depreciation practices to micromanage earnings and 'game' the sharing process. This is the only weakness in the price cap carrier option that [United] and others have identified." United Comments at 6.

[76] We note that USTA's "definition" of this option is not significantly different from the option as proposed. Although the Notice did not expressly state that "major data elements" used to determine rates would be necessary, our description of the information to be filed should have alerted carriers to the fact that they would be required to file the current Statements A, B, and C. Under those statements, carriers must now file those "major data elements."

construed to prejudge that issue; we will evaluate the continued need for sharing only upon a record specifically addressing the issue. If, however, we were to conclude that sharing was no longer necessary for the public interest, we obviously would consider reevaluating our decision here.

44. We also do not believe that the LECs yet face a level of competition that would permit granting the degree of flexibility provided by this option. Although the LECs face emerging competition in the provision of certain services, we do not find that it is sufficiently vigorous for us to conclude that this option would be in the public interest. We note that we adopt today a modified form of the price cap carrier option for AT&T. But unlike the LECs, AT&T's price cap plan does not incorporate a sharing mechanism. And while we would not necessarily conclude that AT&T's level of competition is a benchmark for using the price cap carrier option, we do conclude that the LECs' competitive pressures must be greater than they are today before the price cap carrier option will be considered for them. Again, if we determine in the future that the sharing component of the LEC price cap plan is no longer necessary and/or competition in the LECs' markets is sufficiently robust, we would be prepared to revisit this issue.

(ii) Safeguards

45. The price cap carrier option is not saved by the LECs' suggested safeguards. First, these safeguards do not address our view that competition for LECs must be more robust before they can move down the depreciation reform spectrum. Second, such safeguards, while providing some minimal limitation on earnings management, still do not limit effectively the opportunity and incentive for carriers to avoid their sharing obligation.[77] For example, the LECs argue that good business judgment would dictate against proposing inaccurate rates because the carrier would not be able to pass extra expenses on to consumers. In a highly competitive environment, this statement is true, but the LECs are not yet in a highly competitive environment. Moreover, the LECs' depreciation choices affect rates. If a carrier were to increase depreciation rates and thus depreciation expense unnecessarily, it would lower earnings. If the carrier would have been in the sharing zone without the increased depreciation, ratepayers would lose future rate reductions that would normally accompany a carrier's sharing obligation.[78]

46. The LECs' argument that external controls are sufficient is also unpersuasive at this time. As the Ernst and Young Report states, GAAP places some limits on a carrier's ability to use depreciation expense to manage

---

[77] We note that any option giving carriers more flexibility in the depreciation prescription process offers them some opportunity to manage their earnings. However, the basic factor range option minimizes such opportunity by its use of ranges based on currently prescribed depreciation rates, the opportunity for review of such ranges, and the determination of the reasonableness of factors within established ranges.

[78] A LEC could also affect prices paid by consumers through the lower formula adjustment threshold. If earnings were low enough to trigger the lower formula adjustment threshold, the LEC could increase rates.

earnings.[79] However, we do not find the Ernst and Young Report entirely persuasive because GAAP is investor-focused. One of the primary purposes of GAAP is to ensure that a company does not present a misleading picture of its financial condition and operating results by, for example, overstating its asset values or overstating its earnings, which would mislead current and potential investors. GAAP is guided by the conservatism principle which holds, for example, that, when alternative expense amounts are acceptable, the alternative having the least favorable effect on net income should be used. Although conservatism is effective in protecting the interest of investors, it may not always serve the interest of ratepayers. Conservatism could be used under GAAP, for example, to justify additional (but, perhaps not "reasonable") depreciation expense by a LEC to avoid its sharing obligation. Thus, GAAP would not effectively limit the opportunity for LECs to manage earnings so as to avoid the sharing zone as the basic factor range option. In this instance, GAAP does not offer adequate protection for ratepayers.

47. The LECs also argue that regulatory oversight will prevent carriers from using depreciation to manage earnings. Again, it is true that our oversight and state commissions' oversight can provide some protection through filing requirements and monitoring. However, we believe the best approach, the approach that most appropriately balances ratepayer and company interests, is to ensure carriers do not use depreciation to avoid their sharing obligation in the first place.

48. Nor are we convinced that the additional safeguards proposed by the LECs adequately address our concerns at this time. None of the safeguards individually minimizes the carriers' opportunity and incentive to avoid sharing through the use of depreciation expense as effectively as the basic factor range option. Moreover, imposing all of the proposed safeguards would produce a process more burdensome than the basic factor range option with less ratepayer protection. For example, if we were to require carriers to file rates in the first quarter, require independent auditors to certify rates, limit the percentage of change in overall depreciation expense LECs could make annually, and limit the percentage of depreciation expense or rate change per account LECs could make annually, this simple option becomes nearly as burdensome as the current process. Moreover, even with these safeguards, we would need to undertake analyses similar to that required by the basic factor range option.[80]

(iii) State Support

49. In addition, although not determinative of the issue, we note that state commissions aver they will reject the price cap carrier option, and many maintain that they will require carriers to follow, for intrastate purposes, the same requirements or ones similar to those now imposed by this

---

[79] USTA Reply at Ernst and Young Report. GAAP may be an effective control in a vigorously competitive environment; however, the LECs do not yet face such an environment.

[80] For example, to limit the overall change in depreciation expense, we would need to ascertain what those limits should be, which would likely involve determining something similar to a range. This would require analysis of current and other depreciation data.

Commission's depreciation prescription process.[81] Without state support, we find USTA's estimate of administrative savings to be overstated, especially since the states' jurisdiction extends to approximately 75% of carriers' plant costs.

(iv) Other Objectives

50. We note that the LECs, in supporting this option, argue that the price cap carrier option can fulfill several objectives including some that were not the primary focus of this proceeding. Specifically, the LECs argue that this option is necessary because: the Commission does not prescribe "accurate" depreciation rates; the degree of flexibility afforded by the option is necessary for LECs to compete; and this option will provide incentives for LECs to modernize their networks. We disagree with the LECs' conclusions.

51. We disagree with the LECs that the price cap carrier option is necessary because the Commission has not prescribed "accurate" depreciation rates. We recognize that, in the past, our depreciation practices and rates may have lagged behind changes in the telecommunications market.[82] However, we have corrected for these past problems by focusing more on the future, rather than the past,[83] adopting a remaining life rate formula,[84] and adopting ELG methods.[85] Our review of the LECs' reserve positions overall indicates that the LECs' depreciation rates have not been unreasonable in recent history.[86] Moreover, we are unpersuaded by LEC comparisons of the lives of plant underlying their depreciation rates with plant lives used by cable

---

[81] See e.g., Colorado Commission Comments at 5; Nebraska Commission Comments at 2-3; New York Commission Comments at 7; and Texas Commission Comments at 4-5.

[82] See Amendment of Part 31 (Uniform System of Accounts for Class A and B Companies) so as to Permit Depreciable Property to be Placed in Groups Comprised of Units with Expected Equal Life for Depreciation Under the Straight-Line Method, Report and Order, 83 FCC 2d 267 (1980) (ELG Depreciation Order), recon., 87 FCC 2d 916 (1981), supplemental opinion, 87 FCC 2d 1112 (1981).

[83] ELG Depreciation Order, 83 FCC 2d at 294. See also Ameritech Comments at 2-3 ("[T]he Commission prescribed life projections for the Companies' accounts that were within +/- 25 percent of the historical mortality factors less than 30 percent of the time. ... Companies provide the Commission estimates of their depreciation rates based on other analyses, such as technology substitution forecasts and product life cycle forecasts." (emphasis added)).

[84] ELG Depreciation Order, 83 FCC 2d at 288-290, paras. 76-84.

[85] Id. at 280-286 and 293, paras. 47-66 and 93, respectively.

[86] The overall LEC reserve is approximately 40%; this Commission's staff studies show that the reserve should be approximately 42%. Moreover, since 1981, the reserve has grown from approximately 19% to its current level of 40% today.

companies and foreign telecommunications companies. They have failed to demonstrate that their comparisons are reasonable. For example, the LECs do not show that the lives of plant for foreign telecommunications companies are measured in the same manner, determined by the same methodologies, or correspond to plant held by LECs.[87]

52. We also do not find that the price cap carrier option, standing alone, is likely to encourage investment in the telecommunications infrastructure. We understand the LECs to argue that higher (and in the LECs' view, more accurate) depreciation rates encourage infrastructure investment because, with higher depreciation rates, the likelihood of fully recovering investment costs is increased.[88] It has not been the Commission's experience that increased depreciation rates lead to increased infrastructure development.[89] There is currently no requirement that the additional revenue flowing from increases in depreciation expense actually be spent on infrastructure development. Moreover, while the LECs' argument that increased depreciation rates increase the likelihood of recovery of plant investment may have some validity under a cost-plus system (like rate of return/rate base regulation), under the price cap system this argument loses force. To ensure full recovery from ratepayers under price cap regulation, depreciation expense would need to be treated as an exogenous cost. Nothing on this record would lead us to conclude that exogenous treatment of depreciation expense is in the public interest.

53. Importantly, in regard to each of the LECs' additional objectives, "accurate" depreciation rates, competitive ability, and infrastructure development, we note that this Commission prescribes depreciation rates based on carriers' investment plans. Our rates are based on carriers' own decisions of when to deploy new plant and to retire old plant. In prescribing rates, we also give great weight to the companies' future plant investment plans. As the LECs implement network modernization plans, their depreciation rates and expense should follow naturally. Thus, we believe that the LECs' additional objectives are addressed under our current process and will continue to be addressed under the option we adopt today.

54. Finally, we find unpersuasive the LECs' arguments that this option is necessary for them to compete in the interexchange access market. Although facing emerging competition today, the LECs have long been the "bottleneck" of interexchange access. At this stage of competition's development, a dramatic change in our depreciation prescription process such as the price cap carrier option, is not necessary to place LECs on a level playing field with new market entrants. As discussed above, provided that our depreciation process is representative of actual rates of plant retirement, the existence of competition, standing alone, does not justify a change in depreciation rates. As competition increases, however, we will address specific depreciation issues when they arise.

---

[87] We note also that foreign telecommunications companies may be more directly influenced by governmental policies than American corporations.

[88] See USTA Reply at 23. See also Pacific Comments at 5-8.

[89] For example, for the period 1980-1992, prescribed depreciation expense more than doubled, while network investment decreased.

55. At the same time, we recognize that the LECs are operating in a rapidly changing environment. Telecommunications technology is changing at an unprecedented pace, and there has been a rapid expansion of the services that new technology makes possible. The LECs now face emerging competition in their current markets, which is likely to increase.[90] They are deploying increasingly sophisticated networks that provide vastly increased intelligence and capacity.

56. We recognize that the increase in competition and the rapid changes in technology and services may lead LECs to request an acceleration of their depreciation to reflect an increase in their replacement of plant to ensure improved network functionality and service quality. We must ensure that the regulatory process will respond quickly to these dynamic market and technological changes. The goal of our depreciation prescription process is to accurately reflect the actual rate of plant retirement. We would not want any lag in that process to inhibit carriers from moving forward with their infrastructure development plans. We therefore intend to institute a further proceeding as expeditiously as possible to explore ways in which our depreciation process and policies can become more responsive to actual changes in patterns of LEC investment and plant retirement. We would expect to consider specific ways of rewarding, through increased depreciation, those companies that rapidly modernize their infrastructure to meet market and technological changes.

2. Implementation of the Basic Factor Range Option for the Price Cap LECs

a. Summary

57. We now address implementation issues raised by the decision to incorporate the basic factor range option into our depreciation prescription process. We conclude that:

(1) we will begin to incorporate ranges into the depreciation process in 1994;

(2) we will establish ranges for all accounts, to the extent feasible and as soon as possible;[91]

---

[90] See supra n. 20.

[91] Although we speak of prescribing depreciation rates by account for convenience, as a practical matter, we prescribe depreciation rates by rate category. For a majority of plant accounts, there is only one rate category. However, for six plant accounts, we allow carriers to subdivide the accounts so that there is more than one rate category. See 47 C.F.R. §§ 32.2232, 32.2421, 32.2422, 32.2423, 32.2424, and 32.2426. The majority of carriers do subdivide these six accounts because they seek rates for more homogeneous groupings of plant within these accounts. For example, in the cable accounts, we generally prescribe a separate rate for copper (metallic) and fiber (nonmetallic) cable. We do not, by our reference to prescribing rates by account, foreclose the possibility that we will establish ranges based on the data at the rate category level.

(3) we will allow a carrier to begin using the range approach in 1994, if the carrier's current basic factors fall within the established ranges, as described herein;

(4) we will not allow a carrier to begin using the range approach until its next scheduled prescription, if its current basic factors fall outside the ranges; and

(5) we will allow a carrier, once its basic factors are in the established ranges for an account, some flexibility in selecting basic factors from within those ranges, as described herein.

We direct the Bureau to recommend to the Commission the initial set of range accounts and their ranges as soon as possible so that the Commission may seek comment on those accounts and ranges.

b. Data and Procedures to be Used to Establish Ranges

(1) Introduction

58. In the Notice, we invited comment on the data to be used to establish the ranges. We also invited comment on the appropriate width of the ranges. We set forth a tentative proposal to establish ranges of +/- one standard deviation from the industry-wide average of the basic factors underlying currently prescribed depreciation rates.[92]

(2) Comments

59. A majority of the commenting state commissions agree that the starting point for any set of ranges should be the basic factors underlying currently prescribed rates,[93] although a few suggest that the ranges should consider specific state plans affecting depreciation rates.[94] The LECs, as a group, reject this approach, especially for large accounts.[95] The carriers argue that these factors are too rigid in light of the continuing changes in technology and competition. They suggest that the Commission use, as a starting point, (1) basic factors underlying the LECs' and IXCs' most recently proposed depreciation rates; or (2) forward-looking data from the entire

---

[92] Notice, 8 FCC Rcd at 148, para. 14.

[93] See e.g., Idaho Commission Comments at 3; Indiana Commission Comments at 4; and Michigan Commission Staff Comments at 5. See also SCA Comments at 12.

[94] See e.g., Missouri Commission Comments at 2.

[95] See e.g., Ameritech Comments at 10; GTE Comments at 11; and NYNEX Comments at 14-15. Bell Atlantic, however, suggests that basic factors underlying currently prescribed rates could be used for the small accounts, if a range width of two standard deviations is used. Bell Atlantic Comments at 11.

telecommunications industry.[96] United states that the Commission should, for specific accounts,[97] oversee the development of benchmark lives using "independent outside analysis by an Accounting Firm(s), a Technology Futures firm(s), and a Telecommunications Equipment Manufacturer(s), as well as the affected LECs."[98]

60. The commenters also address the issue of what the width of the ranges should be. Although many state commissions support our proposed range width of +/- one standard deviation,[99] some state commissions are concerned that a width of one standard deviation would be too narrow to effectively capture most of the companies' basic factors.[100] A number of those state commissions suggest alternative range widths.[101] All of the companies addressing this issue propose wider ranges.[102] USTA argues that ranges should be wide enough for carriers to have room for adjustments over time.[103]

(3) Discussion

61. Establishing these ranges requires us to consider our objectives in light of the public interest. On the one hand, we wish to make the ranges wide enough to accommodate a significant number, if not all, of the LECs. On the other hand, we must not make the ranges so wide that they would no longer enable us to exercise effective oversight of depreciation rates. It is for this reason that we proposed to establish ranges based on current basic factors with a width of one standard deviation. We have already reviewed

---

[96] See e.g., Bell Atlantic Comments at 11; BellSouth Comments at 35; NYNEX Comments at 14-15; and SNET Comments at 18.

[97] The accounts are Central Office, Circuit, Copper, Fiber and Pole accounts.

[98] United Comments at 8-9.

[99] See e.g., Idaho Commission Comments at 3; Indiana Commission Comments at 4; and Michigan Commission Staff Comments at 5.

[100] See e.g., Washington Commission Comments at 3, California Commission Comments at 3; Wisconsin Commission Comments at 3.

[101] For example, California Commission suggests using a range width that would include all carriers' current basic factors. California Commission Comments at 3. Wisconsin Commission suggests that the Commission establish ranges wide enough to accommodate 80% of current basic factors. Wisconsin Commission Comments at 3.

[102] CBT and Bell Atlantic proposed a width of at least two standard deviations. CBT Comments at 11; Bell Atlantic Comments at 11. SNET recommended that the width be based on the highest and lowest proposed factors by carriers. SNET Comments at 18.

[103] USTA Comments at 19.

current basic factors and found them to be reasonable.[104] We sought comment on a width of one standard deviation because, under a normal distribution pattern, a majority of the carriers' basic factors would fall within that range.

62. After careful consideration of the comments and analysis of many of the basic factors underlying current rates, we believe that our proposal may be too rigid. Our analysis indicates that, because of variances among LECs' basic factors, a range width of one standard deviation around the mean could be either too narrow or too wide for some accounts. Moreover, because we will review ranges on a schedule that will not coincide with every carrier's represcription schedule,[105] we believe we should, when appropriate, consider company retirement and modernization plans to determine whether there are technological trends that might not be fully reflected in all of the carriers' current rates. Therefore, in establishing ranges, we will start with ranges of one standard deviation around an industry-wide mean of basic factors underlying currently prescribed rates. From that point, we will consider other factors such as the number of carriers with basic factors that fall within this initial range and future LEC plans in determining the actual range width for any one account.

c. Accounts for Which Ranges will be Established

(1) Introduction

63. In the Notice, we sought comment on whether we should adopt ranges for all accounts.[106] We tentatively concluded that we should not because we believed that the divergence of basic factors from company to company made a number of accounts less adaptable to ranges. We sought comment on this conclusion and on criteria to be used in the selection of range accounts.

(2) Comments

64. All carriers support adoption of ranges for all accounts, arguing that there would be little measurable savings without ranges for all accounts.[107] They also contend that establishing ranges for all accounts eliminates yet another regulatory hurdle -- establishing criteria and reviewing accounts to determine whether they meet the criteria. The state

---

[104] However, as we have stated previously, because the basic factors are estimates, they are subject to the exercise of reasonable judgment. By establishing ranges, we recognize this fact, and give carriers more flexibility in the final exercise of this reasonable judgment.

[105] Although we intend to establish ranges for all accounts if feasible and will allow carriers to move within those ranges annually, we will continue the three year represcription cycles for carriers because ranges will not be established all at once and not all carriers will use ranges for all accounts.

[106] Notice, 8 FCC Rcd at 148-149, para. 16.

[107] See e.g., Pacific Comments at 6; and SNET Comments at 18. See also USTA Comments at 17.

commissions generally support ranges for less than all of the accounts.[108] They suggest a wide range of criteria for determining which accounts are appropriate for range selection. For example, the Missouri Commission suggests that only accounts that individually constitute less than 2% of total plant investment company-wide be used.[109]

(3) Discussion

65. We believe that establishing ranges for all accounts would further our administrative savings goal for this proceeding. We will therefore, to the extent feasible, establish ranges for all plant accounts.[110] However, because we wish to implement this range approach for 1994, we find it impracticable to have ranges established for all accounts at once. With limited staff and resources, the analysis necessary to establish ranges for all accounts by 1994 cannot be completed. Thus, we direct the Common Carrier Bureau to identify those accounts readily adaptable to the range approach and recommend them to us so that we may invite comment on the initial ranges for those accounts for implementation in 1994. We further direct the Bureau to establish ranges for the remaining plant accounts where feasible and as soon as possible.

d. Range Participation

(1) Introduction

66. In the Notice, we proposed to mandate ranges for all carriers. We reasoned that our ranges would provide sufficient flexibility for carriers so that mandatory participation would be reasonable.[111] At the same time, we recognized that some carriers' basic factors initially would fall outside of the established ranges, and we would need to move these carriers' factors toward the ranges gradually. Also, we conceded that, in certain situations,

---

[108] See e.g., Missouri Commission Comments at 2; New York Commission Comments at 9; and South Dakota Commission Comments at 1. But see Indiana Commission Comments at 5.

[109] Missouri Commission Comments at 2. Other suggested criteria include the amount of variance in basic factors among carriers and the extent to which accounts are affected by rapid technological or competitive changes.

[110] There are a few plant accounts for which it is technically difficult, and not feasible for 1994, to establish ranges because we have allowed the carriers flexibility in how the accounts are studied for depreciation purposes. For example, carriers are allowed to subdivide their buildings account and estimate lives for each category, although only one rate is prescribed for the account. As a result, there are a wide variety of categorization schemes --some categorize based on the size of the buildings, some by location, and others based on the use of the building. Because of the great differences among the categorization schemes, the projection lives among the companies are currently incompatible. If we are to establish ranges for this account, we must examine the categorization schemes in depth to ascertain the feasibility and desirability of ranges.

[111] Notice, 8 FCC Rcd at 149, para. 17.

some carriers' basic factors would need to remain outside the ranges established. We also proposed to limit LECs' ability to move within the ranges. We sought comment on each of these issues.

(2) Comments

67. There is no general consensus on this issue. A number of parties conclude that the use of ranges should be mandatory,[112] while others argue that they should be optional.[113] A third position is to make ranges optional, but to not allow a carrier that has selected ranges to later opt out of them.[114] However, all parties generally agree that carriers should be required to use ranges when feasible.

68. There is general agreement among a majority of the parties that, if the Commission mandates the use of ranges, carriers with current basic factors outside the ranges should be allowed to move into the ranges over time, a phase-in approach.[115] The commenters differ over the length of the phase-in period; some argue for a three-year transition period to coincide with a carrier's next depreciation prescription,[116] while others contend that a longer phase-in period with LEC discretion for transitioning into the ranges is appropriate.[117]

69. There is also general agreement that, if the Commission mandates ranges, a waiver process would be required. However, the parties differ over the appropriate waiver standard. For example, the Michigan Commission Staff and Pacific agree that a waiver should not be granted except under unique circumstances such as when there is a significant divergence between expected depreciation expenses and depreciation expenses resulting from use of the ranges.[118] The Oklahoma Commission Staff and the New Jersey Commission Staff suggest a waiver standard that incorporates state action affecting depreciation.[119] USTA argues that a carrier should always have the right to

---

[112] Michigan Commission Staff Comments at 5; New Jersey Commission Staff Comments at 5; Pacific Comments at 18; and SNET Comments at 18-19.

[113] NARUC Comments at 6; NYNEX Comments at 14; and Utah Commission Comments at 2.

[114] See California Commission Comments at 4.

[115] See e.g., New York Commission Comments at 9; Pacific Comments at 19; USTA Comments at 18; and Washington Commission Comments at 3.

[116] See e.g., Colorado Commission Comments at 15; and Utah Commission Comments at 2. The SCA proposes a three-year transition period with percentage adjustments specified each year -- 33% adjustment from current rates allowed each year. SCA Comments at 14.

[117] See e.g., Pacific Comments at 19; and US West Comments at 11.

[118] Michigan Commission Staff Comments at 5; and Pacific Comments at 18.

[119] New Jersey Commission Staff Comments at 5; and Oklahoma Commission Staff Comments at 4.

request factors outside ranges, but should be required to make a showing using the current depreciation study requirements.[120]

70. Finally, parties address the issue of whether carriers should be allowed to move within established ranges if their current basic factors for an account fall within that range, both initially and thereafter. A few state commissions recommend limiting carriers to their current basic factors for their initial range selection.[121] The LECs argue that they should be allowed to choose any basic factor within a range initially.[122] The LECs also contend that after their initial range selection, they should be able to select any basic factor from within the range on an annual basis.[123] BellSouth reasons that additional flexibility is warranted in light of the price cap regulatory scheme, and current safeguards such as GAAP and ARMIS.[124] The state commissions are divided; a few agree that the LECs should be given additional flexibility,[125] but others would limit the flexibility by imposing a limit on the percentage change a carrier could make within the range.[126] Moreover, several state commissions would allow a carrier to change its basic factors only at the time of a new depreciation prescription.[127]

(3) Discussion

71. After careful consideration, we believe that we should not force carriers to use the basic factors within established ranges if their basic factors are now outside the ranges because of the Commission's long-held principle that an asset should be depreciated on a straight-line basis over the life of that asset.[128] That is, plant costs should be allocated to

---

[120] USTA Comments at 18.

[121] See e.g., Colorado Commission Comments at 14; Michigan Commission Staff Comments at 5; and Utah Commission Comments at 3.

[122] See e.g., Pacific Comments at 19; and United Comments at 9. See also Wisconsin Commission Comments at 3.

[123] See e.g., BellSouth Comments at 36-38. See also CBT Comments at 11-12.

[124] See BellSouth Comments at 38.

[125] See e.g., Wisconsin Commission Comments at 3. See also NARUC Comments at 7.

[126] See e.g., Michigan Commission Staff Comments at 5; Colorado Commission Comments at 15; and Utah Commission Comments at 3. These commenters do not propose a specified percentage change.

[127] See e.g., Idaho Commission Comments at 4; Indiana Commission Comments at 5; and Missouri Commission Comments at 3.

[128] See 47 C.F.R. § 32.2000(g)(1)(i) ("depreciation percentage rates shall be computed in conformity with a group plan of accounting for depreciation and shall be such that the loss in service value of the property ... may be distributed under the straight-line method during the service life

depreciation expense at a rate representative of the consumption of the plant. If a projection life range of 20 - 25 years was established for a particular account, but a carrier, because of its unique circumstances, is currently using a 10 year projection life, forcing the carrier to use a life within the range would violate this principle. Prescribing depreciation rates that allocate plant costs over the useful life of plant is central to our depreciation policy. Thus, a carrier should use the basic factors that reflect its company operations. Obviously, if a carrier is using a 10 year life because of its unique circumstances, we have reviewed that company's operations and plans and determined that the 10 year life is consistent with such plans. Because we will not mandate the use of ranges for carriers outside the ranges, we need not address the issue of a transition period for moving carriers' basic factors within the ranges.

72. The basic factor range option we adopt today should achieve simplicity, conserve resources, and allow LECs greater flexibility in the depreciation process while remaining consistent with the public interest. We will allow a LEC to seek to change basic factors within the ranges as long as (1) the basic factors underlying that carrier's current rate for an account are within the established ranges and (2) the basic factors proposed to be used for a new rate are within the established range. If these conditions are met, the carrier will only be required to submit the streamlined data, as determined by the Common Carrier Bureau,[129] in its request for a new depreciation rate. Additionally, for range accounts, LECs may seek to change basic factors on an annual schedule as opposed to the current triennial schedule. However, in order to ensure adequate time for us to conduct our represcription proceeding, LECs must file for those changes by April 1 of the year in which new rates are sought. Finally, consistent with our current annual update process, carriers must update all plant accounts at the time they propose any new rate for a range account.[130]

73. We believe this approach is reasonable because the factors that will be the basis for establishing the ranges will have been analyzed and found generally reasonable. We further ensure the reasonableness of the ranges by seeking comment on them. The added degree of flexibility given by this approach means that for any carrier with a prescribed rate derived from basic factors within established ranges for an account, a presumption of reasonableness attaches to all basic factors within the established ranges for that account. However, such a presumption is not conclusive. Any proposed basic factor changes, either inside or outside the ranges, should be based on company operations. If a LEC makes a reasonable showing, based on current

---

of the property.").

[129] We delegate to the Common Carrier Bureau the authority to determine the information to be submitted for these range accounts consistent with our decision here.

[130] See Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: American Telephone and Telegraph Company - Long Lines Department, et al., Order, 96 FCC 2d 257, 268 at para. 33 (1984) ("[w]e can find no reason not to extend this procedure [annual updates] to all accounts to assure that composite rates are kept as current as possible.").

data requirements, that its basic factors should be different from those within established ranges, we would prescribe rates using appropriate basic factors. If other interested parties make reasonable showings that a LEC's operations require the use of basic factors different from those within established ranges or those proposed (although they fall within the ranges), we also would prescribe rates using appropriate basic factors. In either case, the showing would necessarily include a study consistent with our current depreciation analysis process.

74. Finally, we recognize that there may be instances when, for any one account, one basic factor may fall within an established range, but the other does not.[131] We have considered whether to allow a carrier to use the range approach for the factor within the range, but to require the LEC to provide data consistent with the current process to support the factor outside the range. However, because there is an interdependence between the LECs' decisions on appropriate life and salvage estimates,[132] we believe the better approach would be to require a LEC to provide supporting data for both factors consistent with the current depreciation practice. Therefore, if a LEC's current basic factors for any one account do not both fall within the established ranges for that account, the LEC may not use the range approach for that account.

e. Implementation Date for Ranges

(1) Introduction

75. In the Notice, we sought comment on when and how ranges should be implemented. We asked whether we should have a one-time conversion to ranges, or allow carriers to use ranges only after their next prescription.[133] We noted that, although a one time conversion would be expedient, converting all carriers at once might produce such an administrative burden upon regulators and carriers alike that implementation on a staggered basis might be warranted. We invited comment on these issues.

(2) Comments

76. All state commissions commenting on the issue and GTE favor phasing ranges in over the three-year prescription cycle.[134] Other suggestions

---

131 As discussed infra, we are not adopting a range of survivor curves for any range account. Instead, we will require carriers to use company-specific data to determine the appropriate survivor curve to be used for range accounts. The carriers will be required to submit sufficient data to support proposed curves. See infra para. 86.

132 For example, motor vehicles kept in service for two years and then sold would likely yield higher salvage amounts than motor vehicles retired after ten years of service.

133 Notice, 8 FCC Rcd at 149, para. 19.

134 See e.g., GTE Comments at 11; Michigan Commission Staff Comments at 5; and Utah Commission Comments at 2. See also CBT Comments at 12.

include implementing ranges by 1994 for all carriers,[135] or beginning implementation of ranges in 1994, but allowing carriers to move to the ranges at their discretion over a 3 - 5 year period.[136] MCI would allow the range approach to go into effect only after the LEC price cap review is completed.[137]

(3) Discussion

77. We agree that the basic factor range approach should be implemented as soon as practicable. However, given current administrative resources, we are unable to complete a new depreciation prescription for every carrier in 1994. For that reason we set forth the following schedule:

1994 depreciation prescription carriers:

- if a carrier's current basic factors fall within the ranges, the carrier may use the range approach;

- if a carrier's current basic factors fall outside the ranges, the carrier must conduct and submit the regular depreciation analyses (and may show that its basic factors now fall within the established ranges);

- for non-range accounts, the carrier must conduct and submit the regular depreciation analyses.

1995 and 1996 depreciation prescription carriers:

- if a carrier's current basic factors fall within the ranges, the carrier may seek to change a basic factor as long as it is within the range, but the carrier must file for the change by April 1 (consistent with the Common Carrier Bureau's submissions requirements) and must update all other accounts consistent with our annual update process;[138]

- if a carrier's current basic factors fall outside the ranges, the carrier must wait until its next prescription date to show, through a depreciation study, that its basic factors fall within the ranges.

We believe that this approach balances the carriers' interest in simplification and flexibility provided by the range approach, our interest in reasonably allocating scarce administrative resources, and state commissions' right to present their views on depreciation rate changes. We recognize that 1995 and 1996 companies will not be able to make use of ranges for those accounts in which their current basic factors do not fall within the established ranges until their next prescription. However, we believe this minor inconvenience is outweighed by the LECs' ability to use ranges for those

---

[135] See e.g., Bell Atlantic Comments at 11; and SNET Comments at 19.

[136] See e.g., Pacific Comments at 19; Southwestern Comments at 18; and USTA Comments at 17.

[137] MCI Comments at 9.

[138] See supra n. 130.

accounts in which their basic factors do fall within the established ranges and our ability to continue to prescribe depreciation rates in a timely fashion.

f. Reviewing and Updating Ranges

(1) Introduction

78. In the Notice, we sought comment on how and when we should review and update the established ranges. We invited comment on the length of time any set of ranges should be in place, the process for updating, and the data to be used for review.[139] One option we proposed was to complete a depreciation review on an industry-wide basis, which would result in carriers analyzing data and company plans and submitting such information for determination of new ranges. We also asked specifically whether we should simplify this review process further by reviewing data at the regional operating company level or by a sampling method.

(2) Comments

79. Commenters overwhelmingly favor a review period of 3 - 5 years.[140] However, at least three LECs would have us conduct an annual review of the ranges for some or all of the accounts.[141] For the actual updating process and the data to be used for review, NARUC argues that the Commission should establish new ranges based on the companies' continuing property records and mortality data.[142] NARUC also states a preference for review of data at the LEC level, but concludes that use of data aggregated at the regional level may have merit.[143] A majority of companies maintains that the Commission should establish new ranges on the basis of benchmark studies of other communications companies, individual company plans, and filings with the Commission.[144] United, however, proposes new ranges based on the recommendation of an informal depreciation review board composed of industry, Commission and state

---

[139] Notice, 8 FCC Rcd at 149, para.22.

[140] California Commission Comments at 3 (3 years); CBT Comments at 12 (3-5 years, depending upon the account); Wisconsin Commission Comments at 3 (3 years). Both Utah and the SCA favor a two tier review approach. Utah would have the Commission review accounts impacted by technological changes every three years and other accounts every five years. Utah Commission Comments at 3. The SCA would have the Commission review accounts using ELG every three years and other accounts every five years. SCA Comments at 14-15.

[141] See NYNEX Comments at 18; Pacific Comments at 19; and United Comments at 9.

[142] NARUC Comments at 7.

[143] Id.

[144] See e.g., CBT Comments at 12; and Pacific Comments at 19. See also USTA Comments at 20.

representatives.[145]

(3) Discussion

80. We agree with those commenters who suggest that a three year review period is reasonable. We are persuaded that a three year review is necessary to keep ranges in line with technological, demand, and competitive changes. Therefore, barring unforeseen regulatory, market, or technological changes, we will begin a review of the range set for a given account three years after the range is introduced.

81. We believe it premature to establish an all inclusive list of specific data to be used in our review. Regulatory and market changes may require us to consider a broader range of information than our current process does. However, carriers must continue to maintain continuing property records. If we later determine that a review similar to that which we use today is appropriate, carriers will be required to provide such data.

3. Related Issues

a. Price Cap Treatment of Depreciation Expense

(1) Introduction

82. In the Notice, we tentatively concluded that adoption of this range process will not alter our endogenous treatment of depreciation expense changes. We reasoned that, under the basic factor range option, carriers would continue to exert control over their depreciation rates and expenses because the ranges would reflect the carriers' actual depreciation experience and future plans.[146] We found that this would result in carriers controlling the ranges to approximately the same extent that they control the rate-setting process today. Moreover, we recognized that they would have added control over the basic factors they selected within the ranges, and thus added control over depreciation rates and expenses.[147]

(2) Comments/Discussion

83. No party to this proceeding objects to our conclusion that the basic factor range option does not undercut our analysis supporting endogenous treatment of depreciation expense. We therefore conclude that incorporation of the basic factor range option into the depreciation prescription process does not affect our determination that depreciation expense should be an endogenous cost under price caps.

---

[145] United Comments at 9.

[146] Notice, 8 FCC Rcd at 150, paras. 23-24.

[147] Id.

b. Equal Life Group Procedures

(1) Introduction

84. In the Notice, we sought comment on whether we should continue our equal life group (ELG) procedures in light of our proposal to use ranges for all of the basic factors used in the depreciation rate formula. As we explained there, we do not determine a future life expectancy for every asset in every account. Rather, we group assets by age (by vintage) and may further refine the group by subdividing assets of the same age into equal life groups. This grouping procedure is known as ELG. We believe ELG allows for more accurate depreciation than vintage grouping. However, because ELG rates are very sensitive to the survivor curve shape, we have only allowed the use of ELG when the necessary data to determine the curve shape is available for a specific account of an individual carrier.[148] Because we proposed to establish a range of survivor curves for plant accounts based on industry-wide data, we questioned whether this should affect our continued use of ELG.

(2) Comments

85. A majority of state commissions commenting on this issue advocates eliminating the use of ELG because company-specific data would not be used to develop the actual survivor curve selected by a carrier.[149] Moreover, these parties argue that eliminating ELG will greatly simplify the current depreciation prescription process.[150] The companies argue for the continued use of ELG.[151] USTA contends that ELG rates would not be materially affected by the use of industry curves.[152] CBT states that the Commission could devise one standard curve for each account for which ranges will be adopted. This, CBT contends, would allow the Commission to continue to use ELG because a standard curve would create a standard ELG recovery pattern for all carriers.[153]

(3) Discussion

86. Carriers employ various curve fitting techniques to determine the appropriate survivor curves to be used in computing their depreciation

---

[148] See id. at 150, para. 25, citing, ELG Depreciation Order.

[149] See e.g., Colorado Commission Comments at 19; Florida Commission ex parte Comments at 3-4; and Washington Commission Comments at 3.

[150] See e.g., Colorado Commission Comments at 19.

[151] See e.g., GTE Comments at 11-12; and Pacific Comments at 20.

[152] USTA Comments at 21.

[153] CBT Comments at 12.

rates.[154] This divergence in curve-fitting techniques makes it impracticable to specify a range of curves that all carriers can apply. In addition, as we stated in the Notice, the use of ELG procedures is premised on the availability of company-specific survivor curves.[155] We have recognized that ELG procedures allow for more timely depreciation.[156] Thus, we find that the most rational approach to these issues is to allow carriers to employ company-specific curves, reflecting their actual experience and current curve-fitting techniques. This approach will allow for the continued use of ELG procedures. Carriers must submit data supporting their curves with their proposed rates for range accounts as required by the Common Carrier Bureau.[157] For non-range accounts, carriers will be required to continue to follow the current process. Because we will not establish ranges of survivor curves, the issue of eliminating ELG is moot.

c. Reserve Deficiencies

(1) Comments

87. A number of parties ask what should happen to current and future reserve deficiencies if any simplification option were adopted. A number of state commissions conclude that, because all of the options give LECs a greater degree of flexibility, LECs should be responsible for any future reserve deficiencies.[158] In effect, these parties argue that any resulting reserve deficiency would be caused by LEC decisions. The LECs, on the other hand, hold that under any option, except perhaps the price cap carrier option,[159] current and future reserve deficiencies would need to be taken care of through the amortization process.[160] They conclude that any reserve deficiency would be caused by regulatory oversight.

---

[154] For example, most of the BOCs use Gompertz-Makeham curve fitting techniques. The Gompertz-Makeham curves are based on equations that smooth and extend an observed life table. Most of the other LECs use Iowa curves. Iowa curves are standardized tables that are fit to an observed life table by trial and error.

[155] Notice, 8 FCC Rcd at 150, para. 25.

[156] ELG Depreciation Order, 83 FCC 2d at 281 and 283, paras. 48 and 55.

[157] Carriers should continue to use the curves currently determined for those range accounts for which mortality data may not yet definitively describe retirement dispersions.

[158] See e.g., California Commission Comments at 4; Colorado Commission Comments at 16; and New York Commission Comments at 10.

[159] BellSouth suggests that the price cap carrier option would provide sufficient flexibility for carriers to deal with reserve problems without regulatory intervention. BellSouth Comments at 38-40. But see Southwestern Comments at 20-21.

[160] See e.g., BellSouth Comments at 38-40; Southwestern Comments at 20-21; and US West Comments at 13.

(2) Discussion

88. We have already taken steps to correct for reserve deficiencies that may have been caused, in part, by past regulatory decisions.[161] Furthermore, reserve studies do not demonstrate a significant overall LEC reserve deficiency at this time.[162] We also do not find persuasive either position taken by the parties regarding future reserve deficiencies. We believe the better approach is to evaluate any future reserve deficiencies on a case-by-case basis. Although we have adopted a depreciation rate formula that should correct for past inaccuracies in the depreciation process, we cannot say that every potential future reserve problem is, or should be, solved through that formula. We will continue our case-by-case approach.

C. Simplification for AT&T

1. Introduction

89. The Notice suggested that we were considering adopting the same simplification option for AT&T and the LECs. For example, in discussing the implementation issues for the basic factor range option, we sought comment on whether we should adopt separate ranges for LECs and AT&T for any particular account.[163] At the same time, we recognized the differences between AT&T and the LECs in regard to the competitiveness of their markets and their price cap plans.[164]

2. Comments

90. AT&T states that the price cap carrier option is appropriate for it, but not for the LECs.[165] AT&T cites as distinguishing factors the differences in the competitiveness of AT&T's and the LECs' respective markets and the absence of a sharing obligation under AT&T's price cap plan.[166] In addition, a number of state commissions and NARUC indicate that they believe the price cap carrier option "has merit" under a pure price caps system, i.e.,

---

[161] Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, Report and Order, 3 FCC Rcd 984 (1988).

[162] See supra n.86.

[163] Notice, 8 FCC Rcd at 148, para. 15.

[164] See id. at 147-148, para. 8 ("significant competition in the interexchange market, emerging competition in the local exchange market") and at 152, para. 40 ("under the LEC price cap scheme, LECs must share earnings with their customers if earnings fall within the specified sharing zone").

[165] AT&T Comments at 5-8.

[166] Id. In its Reply, AT&T also points out that, for the period 1988-1991, its plant retirement rate was nearly three times greater than the LECs' composite retirement rate. AT&T Reply at Appendix B.

price caps without a sharing component.[167] Moreover, the Virginia Commission Staff expressly states that AT&T should be permitted to use the price cap carrier option.[168] However, the LECs argue that the price cap carrier option should not be turned into the "AT&T option."[169] BellSouth states that AT&T recognizes the benefits of the price cap carrier option, but then AT&T "blithely suggests that only it should be regulated under the [price cap carrier option]."[170] AT&T's suggestion, according to BellSouth is "blatantly self-interested, and must be rejected."[171]

3. Discussion

91. As we have stated, the goals of this proceeding are simplification, administrative savings, and flexibility. We have concluded that the price cap carrier option is the simplest and most flexible option. Moreover, if a carrier is not required to perform detailed depreciation analysis in the intrastate jurisdiction, we believe that this option would produce the most savings. Thus, we would adopt this option for any carrier if other public interest concerns were not raised.

92. After careful consideration of the record, we conclude that AT&T should be allowed to use a modified form of the price cap carrier option. Our reservations about adopting this option for the LECs do not extend to AT&T. AT&T's price cap plan does not include a sharing component. Thus, AT&T will not have an incentive to manage earnings to avoid sharing them with ratepayers. Furthermore, AT&T faces a more competitive market than the LECs.[172] We have recognized this by moving many of AT&T's services into streamlined regulation.[173] Only Basket 1 services, containing residential and small business services, remain fully under price cap regulation. Baskets 2

---

[167] See California Commission Comments at 9; and NARUC Comments at 12. See also GSA Comments at 3 ("[a]t best, an argument could be made for deregulating AT&T's depreciation rates .. because AT&T is now a competitive enterprise.").

[168] Virginia Commission Staff Comments at 3.

[169] See e.g., BellSouth Reply Comments at 10-12.

[170] Id. at 10.

[171] Id.

[172] We note that AT&T's recent plant retirement rate is approximately 14.3%, and its composite depreciation rate is approximately 14.1%. In comparison, the LECs' recent composite plant retirement rate is approximately 4%, and their composite depreciation rate is approximately 7.3%.

[173] Most of AT&T's basket 2 and 3 services have been streamlined. See Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991), recon., 6 FCC Rcd 7569 (1991), further recon., 7 FCC Rcd 2677, pets. for recon. pending; see Competition in the Interstate Interexchange Marketplace, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2659 (1993).

and 3 have only one service each remaining under price cap regulation.[174] For these reasons, we find that AT&T should be allowed greater flexibility than the LECs in the depreciation prescription process. Thus, we will adopt a form of the price cap carrier option for AT&T.

93. Although we find that a price cap carrier option is reasonable for AT&T, we believe that AT&T should provide somewhat more information than that proposed in the Notice because such information will help us monitor the effectiveness of AT&T's price cap plan. Under the price cap carrier option proposed in the Notice, a carrier would need only to provide its current depreciation rates, its proposed depreciation rates, and the changes in depreciation expense that would occur if the proposed rates become effective. Under the price cap carrier option we adopt today, AT&T must submit the information set forth in the Notice, plus generation data, a summary of basic factors underlying proposed rates by account, and a short narrative supporting those basic factors, including company plans of forecasted retirements and additions, and recent annual retirements, salvage, cost of removal. These submission requirements are much less burdensome than the current submission requirements; decreasing the filing requirements from approximately 25 pages per account to approximately 5 pages per account.[175] AT&T may also seek revised depreciation rates under this new prescription process annually.

94. We note that in the Notice, we asked whether the proposed price cap carrier option met the requirements of Section 220 of the Communications Act.[176] The parties addressing this issue are divided. The carriers claim that the option as proposed does not violate the Commissions's obligations under Section 220; the state commissions claim that it does. We need not address the issue, however, because we are not adopting that proposal. Moreover, although we do not reach the issue of whether the price cap carrier option as proposed would be legally sufficient pursuant to Section 220, we are confident that the modified plan we adopt today, as applied to AT&T, addresses the concerns raised by the state commissions because this plan will provide us with the information necessary to review AT&T's proposed depreciation rates for reasonableness.

D. Simplification for Alascom

95. As we stated previously, we had considered whether applying the same simplification option to the LECs and AT&T and Alascom would serve the public interest, although we noted the differences among these carriers. No party spoke directly to the issue of which simplification option should be adopted for Alascom; neither Alascom nor the Alaska state commission has participated in this proceeding. After careful consideration, we have determined that simplification for Alascom should be deferred.

---

[174] The service continuing under price cap regulation in basket 2 is 800 Directory Assistance. The service remaining under price cap regulation in basket 3 is analog private line service.

[175] These information submissions should be consistent with the Common Carrier Bureau's depreciation study guide in format, style, and content.

[176] Notice, 8 FCC Rcd at 152-153, paras. 41-42.

96. The Alaska interstate interexchange market structure is currently in transition. A Federal-State Joint Board has recently sought comment on a tentative recommendation to the Commission in regard to the provision of interstate interexchange service that directly affects Alascom.[177] In light of this, we will defer simplification for Alascom until the Joint Board makes a final recommendation regarding the changes that should be made in the provision of interstate interexchange service in Alaska.

E. Salvage

1. Introduction

97. In the Notice, we asked whether we should change our approach to salvage and cease to consider it in the depreciation prescription process.[178] Instead, carriers would account for the cost of removal and salvage as current period charges and credits on their regulated books of account. Specifically, carriers would account for cost of removal, when it occurred, as a current period charge and salvage as a current period credit.

2. Comments

98. The record on this issue is mixed. The LECs overwhelmingly oppose this change. For example, GTE and Pacific, among others, argue that to change the accounting treatment of salvage would be inconsistent with GAAP.[179] The state commissions, however do not provide such a united front. Many oppose the change,[180] while others believe the idea has merit, but requires further study.[181] GSA and the SCA give their unqualified support for this change, saying that this will result in greater simplification.[182] Two parties offer alternatives to the accounting change. The Oklahoma Commission Staff suggests that the Commission treat salvage as a separate rate which changes independently of the basic depreciation rate.[183] The Washington Commission, while supporting the proposal in the Notice, offers another approach; it proposes that we eliminate salvage accounting for each individual plant account, and establish a single salvage account applicable to all plant

---

[177] See supra n. 10. That Tentative Recommendation endorses elimination of the Joint Service Arrangement (JSA), subject to the institution of suitable transition mechanisms, between Alascom and AT&T. Under the JSA, AT&T reimburses Alascom for its interstate interexchange costs incurred in the provision of interstate message telephone service and wide area telecommunication service, including a return on investment.

[178] Notice, 8 FCC Rcd at 153, para. 43.

[179] See GTE Comments at 14; and Pacific Comments at 21-22.

[180] See e.g., Michigan Commission Staff Comments at 6; Oregon Commission Comments at 3; and South Dakota Commission Comments at 3.

[181] See e.g., Missouri Commission Comments at 6; New York Commission Comments at 9; and Washington Commission Comments at 5.

[182] GSA Comments at 8-10; and SCA Comments at 27-30.

[183] Oklahoma Commission Staff Comments at 6.

accounts.[184]

3. Discussion

99. We have considered whether we should eliminate the future net salvage determination from the depreciation prescription process and instead consider it in current period accounting. We conclude that we will not change the accounting of salvage amounts based on the record before us. The record is mixed, and is replete with the suggestion that further study is needed to determine if the change could and should be made. Additional issues that would need to be studied include whether the proposed change is consistent with GAAP and whether it will create a matching problem. We find that delaying this simplification proceeding to study whether an accounting change should occur is unwarranted, especially in light of the simplification taking place. Therefore, we will continue to determine the future net salvage value in the depreciation process.

## IV. ORDERING CLAUSES

100. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 220(b), 403, that Section 43.43 of the Commission's Rules IS AMENDED, 47 C.F.R. § 43.43, to reflect the changes to our depreciation prescription process as described herein.

101. IT IS FURTHER ORDERED, that the motion for leave to file late filed pleadings by California Cable Television Association IS GRANTED.

102. IT IS FURTHER ORDERED, that pursuant to Section 1.427(a) of the Commission's Rules, 47 C.F.R. § 1.427(a), the amendment to Section 43.43 of the Commission's Rules, 47 C.F.R. § 43.43, shall be effective no later than January 1, 1994.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

[184] Washington Commission Comments at 4.

**APPENDIX A**

Comments Filed

Ameritech Operating Companies (Ameritech)
American Telephone and Telegraph (AT&T)
Bell Atlantic (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
California Cable Television Association (CCTA) (late filed comments)
People of the State of California and the Public Utilities Commission of the State of California (California Commission)
Cincinnati Bell Telephone (CBT)
Colorado Public Utilities Commission (Colorado Commission)
Deloitte & Touche (Deloitte & Touche)
General Service Administration (GSA)
GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)
Idaho Public Utilities Commission (Idaho Commission)
Indiana Utility Regulatory Commission (Indiana Commission)
MCI Telecommunications Corporation (MCI)
Michigan Public Service Commission Staff (Michigan Commission Staff)
Missouri Public Service Commission (Missouri Commission)
National Association of Regulatory Utility Commissioners (NARUC)
Nebraska Public Service Commission (Nebraska Commission)
New Jersey Board of Regulatory Commissioners Staff (New Jersey Commission Staff) (late filed comments)
New York State Department of Public Service (New York Commission)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
North Dakota Public Service Commission (North Dakota Commission)
Oklahoma Corporation Commission Public Utility Division Staff (Oklahoma Commission)
Oregon Public Utility Commission (Oregon Commission)
Pacific Bell and Nevada Bell (Pacific)
South Dakota Public Utilities Commission (South Dakota Commission)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (Southwestern)
District of Columbia Office of People's Counsel, Florida Office of the Public Counsel, Indiana Office of Utility Consumer Counselor, Pennsylvania Office of Consumer Advocate (State Consumer Advocates or SCA)
Tennessee Public Service Commission Staff (Tennessee Commission Staff)
Public Utility Commission of Texas (Texas Commission)
United States Telephone Association (USTA)
U S West Communications, Inc. (US West)
United Telephone - Southeast, Inc. (United)
Utah Division of Public Utilities (Utah Commission)
Virginia State Corporation Commission Staff (Virginia Commission Staff)
Washington Utilities and Transportation Commission (Washington Commission)
Public Service Commission of Wisconsin (Wisconsin Commission)

Reply Comments Filed

AT&T
Ameritech
Bell Atlantic
BellSouth
Colorado Office of Consumer Counsel (Colorado Consumer Counsel)
Deloitte & Touche
GSA
GTE
International Communications Association (ICA)
Iowa Office of Consumer Advocate (Iowa Consumer Advocate) (late filed comments)
MCI
Minnesota Department of Public Service (Minnesota Commission)
NARUC
NYNEX
Pacific
Southwestern
USTA
US West
United

Ex Parte Filings

Ameritech
Bell Atlantic
BellSouth
Florida Public Service Commission (Florida Commission)
GTE
MCI
NARUC
Pacific
Southwestern
USTA
US West

**APPENDIX B**

Part 43 of the Commission's Rules and Regulations, 47 C.F.R. Part 43 is amended as follows:

Reports of Communication Common Carriers and Certain Affiliates

1. The authority citation for Part 43 continues to read as follows:

**Authority: Sec. 4, 48 Stat. 1006, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 211, 219, 220, 48 Stat. 1073, 1077, as amended; 47 U.S.C. 211, 219, 220.**

2. Section 43.43 is amended by revising paragraph (c) to read as follows:

**§ 43.43 Reports of proposed changes in depreciation rates**

*****

(c) Except as specified in subsections (c)(i) and (c)(ii) of this rule, when the change in the depreciation rate proposed for any class or subclass of plant (other than one occasioned solely by a shift in the relative investment in the several subclasses of the class of plant) amounts to twenty percent (20%) or more of the rate currently applied thereto, or when the proposed change will produce an increase or decrease of one percent (1%) or more of the aggregate depreciation charges for all depreciable plant (based on the amounts determined in compliance with paragraph (b)(2) of this section) the carrier shall supplement the data required by paragraph (b) of this section with copies of the underlying studies, including calculations and charts, developed by the carrier to support service-life and net-salvage estimates. If a carrier must submit data of a repetitive nature to comply with this requirement, the carrier need only submit a fully illustrative portion thereof.

(i) A Local Exchange Carrier regulated under price caps, pursuant to §§ 61.41 through 61.49, is not required to submit the supplemental information described above in paragraph (c) of this section for a specific account if: the carrier's currently prescribed depreciation rate for the specific account is derived from basic factors that fall within the basic factor ranges established for that same account; and the carrier's proposed depreciation rate for the specific account would also be derived from basic factors that fall within the basic factor ranges for the same account.

(ii) Interexchange carriers regulated under price caps, pursuant to §§ 61.41 through 61.49, are exempted from submitting the supplemental information as described above in paragraph (c) of this section. They shall instead submit: generation data, a summary of basic factors underlying proposed rates by account and a short narrative supporting those basic factors, including: company plans of forecasted retirements and additions; and recent annual retirements, salvage, and cost of removal.

*****

**SEPARATE STATEMENT**
**OF**
**COMMISSIONER ANDREW C. BARRETT**

**RE: Simplification of the Depreciation Prescription Process [CC Docket 92-296].**

This decision is a substantial step forward in making adjustments to the Commission's depreciation prescription process, but it is clearly not reform. It streamlines the process of setting depreciation rates and provides both AT&T and price cap local exchange carriers needed flexibility in the determination of depreciation rates. These adjustments will result in significant resource savings for both the companies and the Commission. They also respond to the changing marketplace realities of increased competition faced by these carriers and the impact of that competition on the economic lives of their productive assets.

We adopt in this Order the so-called price cap carrier approach for AT&T. Under this approach the company will propose depreciation rates, with substantially reduced supporting information requirements. After receiving comment on the reasonableness of those rates from interested parties, the Commission will prescribe depreciation rates based on AT&T's submission and the comments received. AT&T may seek revision of its depreciation rates annually rather than the previous schedule of every two years.

Ranges for the basic factors that determine depreciation rates will be established for local exchange carriers under interstate price cap regulation. Carriers using basic factors within these established ranges will not need to submit the detailed supporting data required under the current scheme. Further, carriers may seek to change these basic factors annually, as opposed to the current triennial represcription cycle.

I am gratified that the Commission indicates its willingness to consider additional adjustment with an eye toward reform of its depreciation practices as changing circumstances warrant. In particular, the Order notes that elimination of the rate-of-return based sharing backstop for price cap LECs, or lack of LEC's ability to manipulate this to ratepayer's detriment, would warrant reexamination of the appropriate depreciation prescription process for these carriers. So while this is a step in the right direction, much will be needed as the environment continues to change.

**Separate Statement**
**of**
**Commissioner Ervin S. Duggan**

**In Re: Simplification of the Depreciation Prescription Process**

Today we take a major step toward simplification of the Commission's depreciation prescription process by adopting a "range of basic factors" approach for as many accounts as we feasibly can. I support wholeheartedly the goal of simplifying regulation and conserving resources, both ours and the carriers', if we can do so without risk to consumers.

I also support our plans to explore, in a future proceeding, whether there are ways that we can make our depreciation process more responsive to the accelerating pace of carrier investment in their networks. The local telephone companies increasingly will find themselves impelled--- whether by foresight, competitive realities, or consumer demand--- to speed up infrastructure investment. They face increasing competition on all sides, often from companies lucky enough to be able to start with the newest technology. Consumers also stand on the threshold of an explosion of new services that the latest technology has made possible, and they deserve to benefit from that technology.

As we seek to encourage that, it is essential for the Commission to maintain the close tie between FCC-prescribed depreciation rates and the actual rate of new infrastructure investment by the affected carriers.

Carriers that accelerate their replacement of plant with sophisticated new technology should know that their stepped-up investment will also lead to a step-up in their depreciation expense. The promise of accelerated depreciation provides a strong incentive for carriers to invest in network upgrades--- to install digital switches, fiberoptic cable, and sophisticated signalling technology, for example.

Consumer protection also requires that the link between the rate of actual network investment and the rate of depreciation remain intact. First, that link preserves the integrity of the price caps sharing mechanism. Second, that link ensures that ratepayer revenues attributable to increased depreciation are not being funnelled into other telco endeavors--- or even abroad--- but instead are being pumped into the network. Any plan we adopt in a future proceeding must protect consumer interests as well.

The Commission, in its depreciation policies, must respond to the real world changes that telephone companies are undergoing. We must do so in a way that also continues to protect consumers. I have great confidence that we can accomplish both goals.

# # #

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

FCC 93-453

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Affiliates | ) | CC Docket No. 93-251 |

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: September 23, 1993;** **Released:** October 20, 1993

**Comment Date: December 10, 1993**
**Reply Comment Date: January 10, 1994**

By the Commission:

**TABLE OF CONTENTS**


| | Para. |
|---|---|
| I. INTRODUCTION | 1 |
| II. BACKGROUND | 2 |
| III. VALUATION METHODS | 8 |
| A. Overview | 8 |
| B. Tariffed Rates | 13 |
| C. Prevailing Company Prices | 15 |
| 1. Introduction | 15 |
| 2. Marketplace Considerations | 16 |
| D. Fair Market Value | 23 |
| 1. Introduction | 23 |
| 2. Asset Transfers | 25 |
| 3. Services | 30 |
| E. Other Valuation Method Issues | 35 |
| 1. Effect of Valuation Method Changes on Price Caps | 35 |
| 2. Deviation from Specified Valuation Methods | 37 |
| IV. IMPLEMENTATION | 40 |
| A. Costs to the Affiliate Group | 40 |
| 1. Overview | 40 |
| 2. Cost Determination | 44 |
| a. Overall Method | 44 |
| b. Chain Transactions | 48 |
| c. Compliance with Generally Accepted Accounting Principles | 51 |
| d. Accumulated Depreciation and Other Reserves | 52 |
| 3. Cost Apportionment | 54 |

4. Allowable Costs . . . . . 57
a. Overview . . . . . 57
b. Rate Base . . . . . 58
c. Return Component . . . . . 66
d. Expenses . . . . . 72
5. Estimating, Monitoring, and True-up Procedures . . 77
B. Prevailing Company Prices . . . . . 82
1. 75 Percent Test . . . . . 82
2. Other Potential Conditions . . . . . 86
C. Fair Market Value . . . . . 90
D. Miscellaneous Requirements . . . . . 93
1. Cost Allocation Manuals . . . . . 93
2. Independent Audits . . . . . 98
3. Audit Trail . . . . . 99

V. OTHER MATTERS . . . . . 100
A. Applicability to IXCs . . . . . 100
B. Applicability to Price Cap LECs . . . . . 103
C. Applicability to Particular Kinds of Transactions . . 104
1. Parts of Carriers . . . . . 104
2. Transactions between Nonregulated Operations . . . 107
3. Quantification . . . . . 109

VI. PROCEDURAL MATTERS . . . . . 110
A. Ex Parte . . . . . 110
B. Regulatory Flexibility . . . . . 111
C. Comment Dates . . . . . 112

VII. ORDERING CLAUSES . . . . . 113

APPENDIX--PROPOSED RULES

## I. INTRODUCTION

1. In this Notice of Proposed Rulemaking, we undertake a reevaluation of our affiliate transactions rules. Those rules, which were adopted in the Joint Cost proceeding,[1] set forth federal accounting requirements for transactions between carriers and their nonregulated affiliates. We propose to amend those rules to enhance our ability to keep carriers from imposing the costs of nonregulated activities on interstate ratepayers, and to keep ratepayers from being harmed by carrier imprudence.

---

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket No. 86-111, 2 FCC Rcd 1298 (Joint Cost Order) recon., 2 FCC Rcd 6283 (1987) (Joint Cost Reconsideration Order), further recon., 3 FCC Rcd 6701 (1988) (Further Reconsideration Order), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

## II. BACKGROUND

2. The affiliate transactions rules are part of the Uniform System of Accounts (USOA)[2] that the Commission has promulgated so that carriers will record their costs and revenues in a uniform and systematic manner. Generally, that system requires carriers to record as costs and revenues the actual amounts they pay to and are entitled to receive from their suppliers and customers. This approach, however, does not protect ratepayers when carriers deal with their affiliates. Because affiliate transactions occur at less than arm's length, the amounts affiliates pay each other for assets and services are poor indicators of the transactions' underlying value.

3. The Commission has long recognized the problems inherent in valuing affiliate transactions.[3] Originally, the Commission addressed these problems by restricting the USOA accounts used in interstate ratemaking to "just and reasonable" charges and by relying on the ratemaking process to particularize the meaning of that standard.[4] This resulted in two tests for assessing the reasonableness of the amounts carriers paid for affiliate transactions. The first focused on the overall earnings of nonregulated affiliates. Under this test, an affiliate's overall rate of return would be deemed excessive to the extent its five-year average exceeded that permitted the carrier. The second focused on the amounts nonregulated affiliates charged carriers for specific equipment. Under this test, the individual amounts would be deemed excessive to the extent they exceeded competitive benchmarks, as determined by sales or leases of comparable goods and services.[5]

4. In the Joint Cost proceeding, the Commission adopted the present affiliate transactions rules as part of a comprehensive effort to improve the safeguards against improper cross-subsidization. These rules set forth specific methods that all dominant interexchange carriers (IXCs) and local exchange carriers (LECs) other than average schedule companies must use in determining the amounts to record in USOA accounts for affiliate

---

[2] 47 C.F.R. Part 32.

[3] See American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 238-39 (1936); see also American Telephone & Telegraph Co., Charges for Interstate Telephone Service, Docket 19129 (Phase II), 64 FCC 2d 1, 43 (1977) (Docket 19129 Phase II Order).

[4] See AT&T v. United States, 299 U.S. at 246; Docket 19129 Phase II Order, 64 FCC 2d at 80.

[5] Docket 19129 Phase II Order, 64 FCC 2d at 80; see New York State Dept. of Law v. FCC, 984 F.2d 1209, 1211 (D.C. Cir. 1993).

transactions.[6] Although the specified valuation methods are mandatory for federal accounting purposes, the rules neither regulate the prices at which affiliate transactions occur nor preclude the states from adopting different valuation methods for intrastate regulatory purposes.

5. The affiliate transactions rules distinguish between asset transfers and the provision of services. For asset transfers, the rules provide for four valuation methods: tariffed rates, prevailing company prices, net book cost, and estimated fair market value. Carriers must record each asset transferred to an affiliate pursuant to tariff at the tariffed rate. If an affiliate that is selling a non-tariffed asset has also sold the same kind of asset to a substantial number of third parties at a generally available price, the carrier must record the asset transfer at that prevailing company price. Absent a tariffed rate or prevailing company price, the transfer must be recorded at the higher of net book cost and estimated fair market value when the carrier is the seller, and at the lower of net book cost and estimated fair market value when the carrier is the purchaser.[7]

6. The rules for services provide for three valuation methods: tariffed rates, prevailing company prices, and fully distributed costs. Services provided to an affiliate pursuant to tariff must be recorded at tariffed rates. If the provider of a non-tariffed service also provides substantial amounts of the service to non-affiliates, the carrier must record the service at the price non-affiliates pay, which is also referred to as a prevailing company price. All other affiliate services must be recorded at the providers' fully distributed costs. The rules do not use estimated fair market value as a valuation method for services.[8]

7. When the Commission adopted the affiliate transactions rules, it also adopted standards governing the methods carriers employ to apportion their costs between regulated telephone

---

[6] 47 C.F.R. §32.27; see 47 C.F.R. §§64.901, 64.902; Joint Cost Reconsideration Order, 2 FCC Rcd at 6300-01, paras. 154-63; Joint Cost Order, 2 FCC Rcd at 1304-05, paras. 48-49. Thus, the Bell Operating Companies, the GTE Telephone Operating Companies, and about 700 small and mid-sized LECs are subject to the affiliate transactions rules. The Commission exempted average schedule companies because their interstate rates are based on generalized telephone industry data, rather than on each average schedule company's individual costs. See Joint Cost Reconsideration Order, 2 FCC Rcd at 6300, para. 155; see also ICORE, Inc. v. FCC, No. 91-1401 (Feb. 19, 1993).

[7] 47 C.F.R. §32.27(b)-(c).

[8] 47 C.F.R. §32.27(d).

services and nonregulated activities.[9] These standards reflect a fully distributed costing methodology.[10] The costs dominant IXCs and non-average schedule LECs incur for affiliate transactions, like other costs those companies record in USOA accounts, are subject to this regulated/nonregulated apportionment.[11] However, only the American Telephone and Telegraph Company (AT&T) and LECs with annual revenues of $100 million or more are required to file cost manuals detailing their cost apportionment procedures.[12] These manuals must identify each affiliate that engages in transactions with the carrier and describe the nature, terms, and frequency of those transactions.[13]

## III. VALUATION METHODS

### A. Overview

8. In adopting the affiliate transactions rules, the Commission was attempting to develop a workable system of compensating for the faulty incentives traditional rate of return regulation gives carriers in relation to affiliate transactions. Because those transactions occur at less than arm's length, carriers that are able to pass increases in their costs on to ratepayers may be motivated to pay excessive amounts for assets and services obtained from their nonregulated affiliates. Carriers regulated on a rate of return basis also have incentives to undercharge nonregulated affiliates when the undercharges can be offset by increased charges to ratepayers.

9. The affiliate transactions rules seek to compensate for these faulty incentives by controlling the amounts carriers record in USOA accounts for affiliate transactions. Depending on the circumstances of the transactions, the amounts recorded may reflect

---

[9] See 47 C.F.R. §64.901; Joint Cost Order, 2 FCC Rcd at 1318, para. 161.

[10] Joint Cost Order, 2 FCC Rcd at 1299, para. 2; id. at 1312, paras. 109-17.

[11] Bell Atlantic Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 5 FCC Rcd 2551, 2551, para. 3 (1990) (Bell Atlantic Review Order).

[12] 47 C.F.R. §64.903(a), (c); Joint Cost Order, 2 FCC Rcd at 1328, para. 236. Although Alascom, Inc. (Alascom) is also a dominant IXC, it is not required to file a cost allocation manual. See Letter from Gerald Brock, Chief, Common Carrier Bureau, FCC, to John D. McGraw, Manager, Tariffs and Regulatory Affairs, Alascom, Inc. (June 23, 1988)(Alascom Letter).

[13] 47 C.F.R. §64.903(a)(4)-(5); Joint Cost Order, 2 FCC Rcd at 1328, para. 240.

the tariff rates, net book costs, fully distributed costs, prevailing company prices, or estimated fair market values applicable to individual assets and services. We have over six years of experience in applying these valuation methods. That experience has let us analyze the bases for and practical effects of the present methods in far greater detail than was possible prior to their adoption. The remainder of this Part sets forth that analysis in detail. Based on that analysis, we believe the present mix of valuation methods may not be optimal for protecting ratepayers against cross-subsidization.

**10.** Our reasons for believing those methods to be less than optimal derive from the role accounting data play in our overall regulation of dominant IXCs and non-average schedule LECs. To varying extents, those carriers' interstate rates are based on USOA accounting data.[14] When the carriers engage in arm's length transactions, the requirement that carriers record the actual amounts they pay or are entitled to receive helps ensure that the accounting data are reliable.

**11.** The problem presented by dealings between affiliates is that there are no arm's length transactions to reliably measure how transactions should be valued. Because of this lack, we believe that we should look beyond the prices affiliates pay each other and focus on the costs the affiliate group incurs in providing affiliate transactions.[15] We believe that those costs provide a useful tool for determining the amounts the carrier would have paid

---

[14] See Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, Report and Order, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993) (Regulatory Reform Order). The relationship between accounting data and interstate rates is less direct for price cap carriers than it is for carriers regulated on a traditional, rate of return basis. Nonetheless, affiliate transactions rules assist us in determining price cap carriers' earnings, an important measure of carrier performance under price caps and the key component of the LECs' revenue sharing requirements. See Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6835, paras. 397-98 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon., 6 FCC Rcd 2637 (1991), petitions for further recon. dismissed, 6 FCC Rcd 7482 (1991), further modified on recon., 6 FCC Rcd 4524 (1991) (ONA/Part 69 Order), petitions for recon. of ONA/Part 69 Order pending, LEC Price Cap Order affirmed sub nom. National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993). See also notes 70-71, infra.

[15] We use "affiliate group" to refer to all entities that directly or indirectly control, are controlled by, or are under common control with a carrier.

or received had it dealt only with non-affiliates.[16] We recognize, however, that cost-based valuation may not produce reasonable results in all circumstances, and we propose to depart from that valuation method when circumstances so warrant. We invite comment on this proposal.

12. In the remainder of this Part, we consider potential departures from cost-based valuation for transactions provided pursuant to tariff, for transactions for which the providing affiliate has established prevailing company prices, and for transactions for which the fair market value differs from the affiliate group's costs. We invite the commenters to address whether the circumstances surrounding these types of transactions warrant departure from cost-based valuation and whether there are any additional circumstances that warrant such a departure.

**B. Tariffed Rates**

13. The affiliate transactions rules now require carriers to record at tariffed rates affiliate transactions provided pursuant to tariff. Because carriers are obligated to charge tariffed rates for tariffed services, we believe that the relationship between the carrier and the purchasing affiliate is functionally indistinguishable from the relationship between the carrier and other purchasers of the tariffed goods or services. In addition, tariffed rates are subject to federal and state regulation. In these circumstances, we propose to retain our requirement that affiliate transactions provided pursuant to tariff be recorded at tariffed rates.

14. We also propose to treat affiliate transactions as being provided pursuant to tariff only if the tariff is generally available, on file with a federal or state agency, and in effect. Finally, we propose to require all affiliate transactions that meet these three conditions to be recorded at tariffed rates. We invite comment on these proposals.

**C. Prevailing Company Prices**

**1. Introduction**

15. A non-tariffed asset or service is deemed to have a prevailing company price whenever the affiliate that provides the asset or service also provides substantial quantities of it to non-affiliates. When such a price exists, the rules require the

---

[16] We propose to rely on affiliate group costs, rather than the providing affiliate's costs, because the providing affiliate may have purchased either the transferred item or resources used to produce the transferred item from another affiliate. As with other affiliate transactions, the transfer prices for such purchases do not reliably measure value.

carrier to record the affiliate transaction at that price. We believe that this reliance on prevailing company prices may be inconsistent with how affiliates deal with each other and may unnecessarily burden both this Commission and carriers. In the remainder of this section, we reexamine the reasons for using prevailing company pricing as a valuation method for affiliate transactions. Since we believe that use to be unjustifiable except in limited circumstances, we propose to curtail sharply the rules' reliance on prevailing company pricing. We invite comment on this proposal.

**2. Marketplace Considerations**

16. In the Joint Cost proceeding, the Commission selected prevailing company prices as a valuation method because it believed that those prices would provide a reasonably reliable measure of fair market value.[17] Our experience in applying the rules has failed to substantiate this belief. Instead, it appears that there may be little correlation between the prices carriers contend are prevailing company prices and the prices carriers or their affiliates would pay if they granted non-affiliates terms similar to those implicit in the affiliate transactions. We believe that this apparent dissimilarity stems from the way the marketplace distinguishes among different supplier/customer relationships.

17. In a competitive market, companies devote extensive resources to retaining and attracting customers. Depending on the nature of the market, these efforts include sales presentations, advertising campaigns, discounts for volume purchases or long-term commitments, and other inducements. Each competitor's goal is to persuade independent entities to pick its goods or services over those of other potential suppliers. A supplier that fails to match its competition risks losing its customers.

18. Affiliate transactions take place in a different environment. Because affiliates are under common control, they are often captive customers of each other. As a result, sales between affiliates usually do not require extensive marketing efforts and generally involve lower transactional costs than sales to non-affiliates. In many instances, moreover, the affiliate relationship reduces the supplier's business risks. Since the customer is more likely to deal with an affiliated than with a non-affiliated supplier, such a relationship can give the supplier a sales guarantee that other suppliers can achieve only through long-term contracts. In these circumstances, we question whether affiliate transactions are sufficiently similar to transactions among non-affiliates to justify the continued use of prevailing company prices as a valuation method for affiliate transactions.

---

[17] See generally Joint Cost Reconsideration Order, 2 FCC Rcd at 6296-97; Joint Cost Order, 2 FCC Rcd at 1336.

We invite comment on whether there is such a similarity and, if there is no such similarity, on whether there are other grounds for retaining prevailing company pricing as a valuation method.

**19.** We also invite comment on whether we should distinguish among classes of nonregulated affiliates in reevaluating prevailing company pricing. In this regard, we note that carrier affiliates appear to fall into two classes: those having a primary purpose to serve the carrier and other affiliates, and those that do not. In our view, dealings between the carrier and nonregulated affiliates in the first group are inherently different from arm's length transactions. As a consequence, we tentatively conclude that we should discontinue prevailing company pricing as a valuation method for transactions between carriers and nonregulated affiliates having a primary purpose to serve the carrier and other affiliates.[18] We invite comment on this tentative conclusion.

**20.** In contrast, we believe that dealings between the carrier and nonregulated affiliates whose purpose is to serve non-affiliates may possess many of the characteristics of arm's length transactions. We request the commenters to discuss whether this is so and whether there are other distinctions among nonregulated affiliates that we should consider in reevaluating prevailing company pricing. We also invite commenters to describe specific kinds of transactions in which the circumstances suggest that the affiliates are, or are not, dealing at market prices.

**21.** In theory, the best way to distinguish nonregulated affiliates whose predominant purpose is to serve non-affiliates from other nonregulated affiliates would be to examine each nonregulated affiliate's overall operations in detail. We believe, however, that such examinations would be far too onerous. We also believe that we could approximate the results of such examinations by measuring the percentage of each nonregulated affiliate's total output that is sold to non-affiliates. We further believe that we may use this percentage to establish a "bright line" test for identifying when a nonregulated affiliate's predominant purpose is to serve non-affiliates. Under such a test, a nonregulated affiliate would be deemed to have such a purpose, and thus be eligible for prevailing company pricing, if and only if it sells at least a specified percentage of its output to nonregulated affiliates. We invite the commenters to discuss whether such a test would properly measure when affiliate transactions should be eligible for prevailing company pricing and to suggest alternatives we might use to determine when prevailing company prices reliably measure the value of affiliate transactions.

---

[18] Under this approach, the prices the providing affiliate charges non-affiliates could continue to be used to establish fair market value. See para. 92, infra.

**22.** We also invite comment on the percentage of sales to non-affiliates that we should require nonregulated affiliates to have before their affiliate transactions are eligible for prevailing company pricing. We tentatively conclude that any nonregulated affiliate that sells less than 75 percent of its output to non-affiliates has too large a volume of affiliate transactions to be deemed to have a predominant purpose of serving non-affiliates. Therefore, we propose to continue to allow prevailing company pricing only for affiliate transactions in which the nonregulated affiliate sells at least 75 percent of its output to non-affiliates. We invite the commenters to discuss this proposal as well as alternative percentages we might use. We also invite comment on whether we should abandon prevailing company pricing as a valuation method for all affiliate transactions if we find no workable test for determining when prevailing company prices provide reliable measures of how affiliate transactions should be valued.

**D. Fair Market Value**

**1. Introduction**

**23.** In the Joint Cost proceeding, the Commission adopted two sets of valuation methods for affiliate transactions that are neither tariffed nor subject to prevailing company prices. The Commission required carriers to record asset transfers meeting those criteria at the higher of net book cost and estimated fair market value when carriers are sellers, and at the lower of net book cost and estimated fair market value when carriers are purchasers. In contrast, the Commission required carriers to record all non-tariffed services other than those having prevailing company prices at the providers' fully distributed costs.

**24.** We have analyzed the bases for and practical effects of these valuation methods. That analysis has confirmed the reasonableness of the departures from cost-based valuation embodied in the present valuation methods for asset transfers that are neither tariffed nor subject to prevailing company prices. Therefore, we propose to retain this approach.[19] Our analysis has also made clear that the present method for services that are neither tariffed nor subject to prevailing company prices may reward the imprudent acts of buying services for more than, and selling services for less than, fair market value. Accordingly,

---

[19] In making this proposal, we recognize that our proposal to restrict prevailing company pricing to circumstances in which the nonregulated affiliate sells at least 75 percent of its output to non-affiliates, see paras. 15-22, supra, could increase the instances in which carriers would use either cost or estimated fair market value as a valuation method for asset transfers. Such an increase would occur if carriers were to continue to have the same dealings with affiliates.

we tentatively conclude that we should require carriers to record all non-tariffed affiliate transactions for which we do not permit prevailing company pricing at the higher of cost and estimated fair market value when the carrier is the seller, and at the lower of cost and estimated fair market value when the carrier is the purchaser. We invite comment on this tentative conclusion, which we discuss in detail below.

**2. Asset Transfers**

**25.** The present valuation methods for asset transfers that are neither tariffed nor subject to prevailing company prices reflect the Commission's determination in the Joint Cost proceeding that those methods were necessary to keep carriers from shifting costs to regulated activities. The Commission found that because asset transfers between affiliates are generally not arm's length transactions, carriers lacked incentives to maximize sale prices when transferring assets to nonregulated affiliates and to minimize purchase prices when obtaining assets from nonregulated affiliates. To limit the carriers' ability to manipulate asset valuations, the Commission adopted stringent rules for asset transfers that are neither tariffed nor subject to prevailing company prices. These rules require carriers to record all such transfers at the higher of net book cost and estimated fair market value when carriers are sellers, and at the lower of net book cost and estimated fair market value when carriers are purchasers.[20]

**26.** We believe that this antipodal approach is necessary to deter improper cost shifting and to avoid rewarding carrier imprudence. Since asset transfers between affiliates generally occur at less than arm's length, there is no assurance that the prices the affiliates set approximate market values. The rules restrict the ability of the affiliate group to profit from price manipulation by establishing net book cost as a valuation floor for assets the carrier sells nonregulated affiliates and as a valuation ceiling for assets the carrier purchases from nonregulated affiliates. We tentatively conclude that we must retain this floor and ceiling if we are to continue to protect ratepayers against cost shifting. We invite comment on this tentative conclusion.

**27.** The rules also mandate that carriers record asset sales to nonregulated affiliates at estimated fair market value whenever it exceeds net book cost and asset purchases from nonregulated affiliates at estimated fair market value whenever it is less than net book cost. We believe that these departures from cost-based valuation are necessary to deter improper cost shifting and to avoid rewarding carrier imprudence. When a carrier sells assets

---

[20] Joint Cost Reconsideration Order, 2 FCC Rcd at 6295-96, paras. 109-17; Joint Cost Order, 2 FCC Rcd at 1336, paras. 295-98.

to non-affiliates, it has every incentive to obtain at least fair market value. Our accounting and net income rules require that any gain above net book cost be recorded in USOA accounts and be included in net income to the extent the assets were included in the interstate rate base.[21] Our valuation methods for asset sales ensure that ratepayers receive an equivalent gain when the carrier deals with its nonregulated affiliates.

28. Similarly, a carrier would also be acting imprudently if it paid more than fair market value for assets purchased from nonregulated affiliates. Our rules reflect this by requiring that the amounts recorded in USOA accounts for asset purchases not exceed what the carrier would have paid in arm's length transactions. We believe that this valuation method is necessary to avoid ratifying the carrier's imprudent acts. We, therefore, tentatively conclude that the departures from cost-based accounting embodied in the present valuation methods for asset transfers are reasonable to the extent they mandate that transactions be recorded at estimated fair market value. We also tentatively conclude that we should continue to require all non-tariffed affiliate asset transfers for which we do not permit prevailing company pricing to be recorded at the higher of net book cost and estimated fair market value when a carrier is the seller, and at the lower of net book cost and estimated fair market value when a carrier is the purchaser. We invite comment on these tentative conclusions.

29. Although our proposals for asset transfers could increase the circumstances in which carriers and their affiliates would have to deal with non-affiliates in order to obtain fair market value on asset sales,[22] we do not believe that this provides any reason for not implementing those proposals. Our proposal to restrict prevailing company pricing to transactions involving nonregulated affiliates that sell at least 75 percent of their output to non-affiliates is based on our belief that affiliate transactions take place in a different environment from arm's length transactions. If that belief is accurate, we believe that we must at least restrict the availability of prevailing company pricing. We believe, in addition, that we should apply our present methods for non-tariffed asset transfers that are ineligible for prevailing company pricing to all asset transfers that would become ineligible under our proposals.[23] The need for such application, in our view,

---

[21] See, e.g., 47 C.F.R. §§32.7160; 65.450.

[22] See note 19, supra.

[23] Thus, if we completely abandon prevailing company prices as a valuation method, we propose to require all non-tariffed asset transfers between carriers and their nonregulated affiliates to be recorded at the higher of net book cost and estimated fair market value when a carrier is the seller, and at the lower of net book cost and estimated fair market value when a carrier is the purchaser.

would override any potential adverse effects those methods might have on carrier incentives to engage in affiliate transactions.[24] We invite comment on these matters.

### 3. Services

30. In the Joint Cost proceeding, the Commission proposed identical valuation methods for assets and services. These methods would have required carriers to record all affiliate transactions that are neither tariffed nor subject to prevailing company prices at the higher of cost and fair market value when carriers are the sellers, and at the lower of cost and fair market value when carriers are the purchasers.[25] While the Commission applied these methods to asset transfers, the Commission adopted a different method for services. Under this method, carriers must record affiliate transactions consisting of the provision of services that are neither tariffed nor subject to prevailing company prices at the providers' fully distributed costs.[26]

31. The Commission's reason for not applying the asset transfer rules to services was that commenters had suggested that those rules would reduce or eliminate "the incentive for certain service activities to be provided in a more efficient manner than that which the regulated entity would alone achieve."[27] We believe that developments since the adoption of the affiliate transactions rules have undermined this rationale. The affiliate transactions rules took effect on April 3, 1987.[28] Since that date, we have adopted price cap regulatory programs that give AT&T[29] and most large LECs[30] efficiency incentives far stronger than those the valuation methods for affiliate services sought to preserve. Other

---

[24] Compare Southwestern Bell Corp. v. FCC, 896 F.2d at 1381; Joint Cost Reconsideration Order, 2 FCC Rcd at 6296, para. 117.

[25] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Notice of Proposed Rulemaking, CC Docket No. 86-111, 104 FCC 2d 59, 76 & 115 (1986).

[26] See Joint Cost Order, 2 FCC Rcd at 1336, para. 299.

[27] Id. at 1336, para. 294.

[28] New York State Dept. of Law v. FCC, 984 F.2d at 1211, n.1.

[29] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order, and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order), recon., 6 FCC Rcd 665 (1991) (AT&T Price Cap Recon. Order), remanded on other grounds sub nom. AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992).

[30] LEC Price Cap Order, 5 FCC Rcd at 6787, paras. 1-4.

LECs may attain similar incentives by electing either price cap regulation or optional incentive regulation.[31]

**32.** These changes in overall regulatory approach have caused us to reevaluate the effect of our valuation methods for affiliate services on carrier incentives. That reevaluation has made clear that, instead of motivating carriers to operate efficiently, the present valuation methods for affiliate services reward imprudent carrier conduct. By requiring carriers to record services they sell to nonregulated affiliates at the carriers' fully distributed costs even when those costs are less than what non-affiliates would pay the carriers, the rules motivate carriers to sell services for less than fair market value. Similarly, by permitting carriers to record services purchased from nonregulated affiliates at the affiliates' fully distributed costs even when those costs exceed what the carriers would pay non-affiliates, the rules motivate carriers to pay more than fair market value for services. We believe that these motivations are at odds with the incentives toward increased carrier efficiency that our price cap and optional incentive regulation programs were designed to promote. As a consequence, we tentatively conclude that, far from supporting the present valuation method for services that are neither tariffed nor subject to prevailing company prices, efficiency incentives provide a basis for abandoning that methodology. We invite comment on this tentative conclusion.

**33.** We recognize that some commenters may dispute our analysis and argue that the present valuation method has increased overall carrier efficiency. We invite commenters to discuss how, if at all, it might increase carrier efficiency to sell services to nonregulated affiliates for less than fair market value or to buy services from nonregulated affiliates for more than fair market value.[32] We are particularly interested in whether there are any instances in which carriers believe they have increased their overall efficiency by obtaining services from nonregulated affiliates at amounts exceeding the services' fair market value or by selling services to nonregulated affiliates at amounts less than the services' fair market value. We ask commenters to list any specific services that they believe have had such effects and to explain in detail how recording them at the affiliates' fully distributed costs, rather than the services' fair market value, increased carrier efficiency.

---

[31] See Regulatory Reform Order, 8 FCC Rcd at 4555-56, paras. 67-71; LEC Price Cap Order, 5 FCC Rcd at 6818-19, paras. 262-65.

[32] The Commission made no finding on this matter in adopting the present valuation methods. See Joint Cost Order, 2 FCC Rcd at 1336, para. 299; see also Joint Cost Reconsideration Order, 2 FCC Rcd at 6297-98, paras. 130-35.

**34.** In our discussion of asset transfers,[33] we tentatively conclude that we must retain net book cost as a valuation floor for assets the carrier sells nonregulated affiliates and as a valuation ceiling for assets the carrier purchases from nonregulated affiliates if we are to continue to protect ratepayers against cost shifting. That discussion also tentatively concludes that we must depart from this cost standard when cost exceeds fair market value and the carrier is the seller, and when cost is less than fair market value and the carrier is the purchaser. We believe that the reasoning behind these tentative conclusions is equally applicable to service transactions. Therefore, we tentatively conclude that we should require carriers to record all affiliate transactions involving the provision of services, other than those provided pursuant to tariff or permitted to be recorded at prevailing company prices, at the higher of fully distributed costs and estimated fair market value when a carrier is the seller, and at the lower of fully distributed costs and estimated fair market value when a carrier is the purchaser.[34] We invite comment on this tentative conclusion.

**E. Other Valuation Method Issues**

**1. Effect of Valuation Method Changes on Price Caps**

**35.** The price caps systems the Commission adopted for AT&T and the LECs rely on indexes of the costs applicable to individual baskets of tariffed services. These indexes are adjusted each year to reflect inflation in the general economy, productivity growth in the telephone industry, and consumer productivity dividends. The Commission also provided for adjustments in these indexes to reflect cost changes that are beyond the carriers' control and not reflected in the general inflation and productivity growth adjustments. These cost changes are described as "exogenous."[35]

**36.** The valuation methods we propose in this Notice would change the USOA requirements for affiliate transaction accounting. In the price cap proceedings, the Commission determined that

---

[33] See paras. 25-29, supra.

[34] In paragraphs 40-81, infra, we address in detail how these costs would be calculated.

[35] See 47 C.F.R. §§61.44(c)(2), 61.45(d)(1)(ii); see Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," Memorandum Opinion and Order, CC Docket No. 92-101, 8 FCC Rcd 1024, 1025-26, paras. 7-11 (1993).

changes to the USOA should generally be treated as exogenous.[36] In view of that determination, we tentatively conclude that any changes we make in the valuation methods for affiliate transactions should be exogenous. We invite comment on this tentative conclusion.[37]

**2. Deviation from Specified Valuation Methods**

37. In the exercise of its delegated authority, our Common Carrier Bureau (Bureau) has on numerous occasions addressed proposed valuation methods that deviated from those set forth in the affiliate transactions rules. The Bureau has generally rejected these proposals.[38] The sole exception to this general policy has been for services carriers sell to nonregulated affiliates that carriers propose to record at their affiliates' fully distributed costs plus a subsidy to the carriers. Because of an absence of any apparent harm to ratepayers, the Bureau has approved such proposals.[39]

38. This Notice proposes four valuation methods for affiliate transactions: tariffed rates, prevailing company prices, costs, and estimated fair market value. Although we believe that deviations from these valuation methods generally should be prohibited, we tentatively conclude that we should allow alternative valuation methods that reduce regulated costs. We invite comment on this tentative conclusion.

39. We also believe that merely characterizing the

---

[36] 47 C.F.R. §61.44(c)(2) (USOA changes exogenous for AT&T price cap purposes); 47 C.F.R. § 61.45(d)(1)(ii) ("[s]ubject to further order of the Commission," USOA changes exogenous for LEC price cap purposes); see also LEC Price Cap Order, 5 FCC Rcd at 6807, para. 166; AT&T Price Cap Order, 4 FCC Rcd at 3017-18, paras. 294-95;

[37] In para. 109, infra, we invite the commenters to quantify the impact each of the proposed methods would have on regulated operations.

[38] See, e.g., Nevada Bell's and Pacific Bell's Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081, 7083, para. 20-21 (Com. Car. Bur. 1988) (Nevada and Pacific Compliance Order) ("prices 'charged in accordance with a market rate determined by nonaffiliated, third party brokers'"); NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 81, 84, para. 26 (Com. Car. Bur. 1988) ("'[m]arket equivalent prices'") (NYNEX Order).

[39] Local Exchange Carriers' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, 8 FCC Rcd 3105, 3107, para. 16 (Com. Car. Bur. 1993); U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 481, 484-86, paras. 35-42 (Com. Car. Bur. 1989) (U S West Compliance Order).

differential between the method prescribed in the rules and the carrier's proposal as a "subsidy" to the carrier may be insufficient. For instance, when a carrier sells a product to a nonregulated affiliate under a "subsidy" arrangement, both the carrier's "revenue" and the nonregulated affiliate's "costs" for the transaction are higher than they otherwise would be. If the carrier were to record the extra revenue below-the-line,[40] the interstate ratepayers would receive no direct benefit (or harm) from the "subsidy." The nonregulated affiliate, however, could use the product to supply the carrier with a second product that the carrier, in turn, would use to support its regulated activities. If the carrier were to record this second product at the nonregulated affiliate's "cost," the "subsidy" arrangement would result in an increase in regulated costs. We believe that the possibility of such indirect increases militates against any blanket approval for "subsidy" arrangements.[41] We ask the commenters to address how we can avoid such increases while allowing valuation methods that reduce interstate costs.[42]

## IV. IMPLEMENTATION

### A. Costs to the Affiliate Group

#### 1. Overview

40. The valuation methods we propose in Part III of this Notice would require carriers to record certain affiliate transactions at their costs to the affiliate group. Determining those costs involves several steps. It requires an accounting system that records what the affiliate group originally paid for the equipment and other resources used to provide affiliate transactions. Since some of those resources are also used for other purposes, there must be a means for determining the portion of the costs that is used for affiliate transactions. It may also be necessary to specify a rate base methodology, a rate of return the group can earn on the rate base, and an allowable expense methodology.

41. In the remainder of this Section, we propose specific requirements for this costing process. These proposals generally would make carriers calculate affiliate transactions costs using

---

[40] Amounts recorded below-the-line are excluded from interstate costs.

[41] In the arrangements approved by the Bureau, the records made clear that these indirect increases would not occur.

[42] Our proposals would not preclude carriers and their officials from transferring funds among affiliates as long as the transfers do not affect carrier operating expenses.

methods similar to those we require carriers to use in calculating interstate costs. We are proposing this approach because we believe compliance with our rules for calculating interstate costs should not be dependent on the corporate structures through which carriers choose to conduct their operations.

**42.** The costing methods we propose would apply primarily, if not exclusively, to transactions provided by carriers and those of their nonregulated affiliates that have serving carriers and other affiliates as a primary purpose. We believe that these nonregulated affiliates' principal role is to support telecommunications services, either through dealings with affiliated carriers or through transactions with other affiliates that also deal extensively with the carriers. We also believe that carriers themselves could supply all the resources they obtain from these nonregulated affiliates. While we do not intend to dictate how carriers structure their operations, the choice of structure should not result in the inclusion of otherwise impermissible items in interstate costs. In these circumstances, we believe that the costing methods we propose are well within our discretion and may be necessary to prevent unreasonably high interstate costs.

**43.** We recognize, of course, that the costing methods we propose for affiliate transactions would impose burdens on carriers. We ask the commenters to quantify the costs and benefits of each of our proposals, and to suggest alternatives that may reduce costs or increase benefits. We also invite the commenters to address whether each of our proposals would be the most cost-effective alternative for protecting ratepayers against improper cross-subsidization and carriers' imprudent acts.

### 2. Cost Determination

#### a. Overall Method

**44.** The affiliate transactions rules present separate costing methods for assets and services. For asset transfers, the rules specify that costs shall equal "cost less all applicable valuation reserves" when the carrier is the seller[43] and "cost to the originating activity [of] the affiliated group less all applicable valuation reserves" when the carrier is the buyer.[44] For service transactions, the rules specify that cost shall be determined in accordance with the standards and procedures that carriers must use to apportion their costs between regulated and nonregulated activities.[45] Those standards and procedures reflect a form of

---

[43] 47 C.F.R. 32.27(c).

[44] 47 C.F.R. 32.27(b).

[45] 47 C.F.R. 32.27(d).

fully distributed costing that apportions costs in accordance with their causes.[46]

45. Because we propose identical valuation methods for all types of affiliate transactions,[47] we believe that separate costing methods for assets and services may no longer be necessary. As explained below, we propose a costing method that would eliminate the distinction between assets and services now in the affiliate transactions rules. We believe that this method is consistent with how carriers and their nonregulated affiliates keep their accounts, and would provide more accurate costing results than any alternative method. We invite comment on whether these beliefs are correct and on each aspect of this costing method.[48]

46. Some affiliate transactions involve resources that the transferring entity has recorded in an investment account. We propose to require carriers to record as the cost of each such resource an amount equal to the original cost of that resource to the affiliate group less any accumulated depreciation and other associated reserves. When the provider obtained the resource directly from a non-affiliate, the original cost would equal the amount the provider paid the non-affiliate for the resource plus any costs the provider incurred in obtaining the resource from the non-affiliate.

47. Affiliate transactions also involve resources that the provider has recorded in an expense account. When the provider obtained these resources directly from a non-affiliate, we propose to require that their original cost equal the amount the provider paid the non-affiliate for the resource plus any costs the provider incurred in obtaining the resource from the non-affiliate.

**b. Chain Transactions**

48. In some instances, affiliate transactions involve resources that the provider obtained from another member of the affiliate group. For example, a nonregulated affiliate might purchase supplies from another nonregulated affiliate and then sell them to an affiliated carrier. The nonregulated affiliate that purchases the supplies could also use them to make products that it sells to the carrier or other affiliates. These products, in turn, could be transferred among affiliates or used to make

---

[46] 47 C.F.R. 64.901; see also Joint Cost Order, 2 FCC Rcd at 1318-20, paras. 161-72.

[47] See para. 34, supra.

[48] To ensure a complete record, we also invite comment on how we should define "assets" and "services" if we continue to distinguish between those two kinds of transactions.

additional products that are transferred among affiliates.

49. In such chain transactions, we propose to require carriers to calculate the costs of resources obtained from other affiliates in accordance with the valuation methods proposed in this Notice. Under this approach, carriers would continue to trace resources used in affiliate transactions to determine whether the resources had been transferred between or among affiliates prior to the transactions.[49] Resources that had been previously transferred would then be valued at the transferor's tariffed rates, prevailing company prices, fully distributed costs, or estimated fair market value for purposes of determining the costs of future affiliate transactions.[50] We believe that this tracing may be necessary to achieve our goal of protecting ratepayers against cross-subsidization and would not unnecessarily burden carriers or this Commission.

50. Alternatively, we could require that all resources used in affiliate transactions be valued at their original cost to the affiliate group regardless of whether they had previously been transferred between or among affiliates. We invite the commenters to compare the costs and benefits of these two approaches to chain transactions, and to suggest alternative approaches that would maximize overall benefits while minimizing costs.

### c. Compliance with Generally Accepted Accounting Principles

51. Although dominant IXCs and non-average schedule LECs must comply with the affiliate transactions rules, this Commission has subjected neither connecting carriers[51] nor nonregulated affiliates to other portions of the USOA. To ensure that the costing process

---

[49] See NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978, 5980-81, paras. 21-25 (Com. Car. Bur. 1988) (NYNEX Compliance Order).

[50] An example might help illustrate this process. Assume that a nonregulated affiliate (A) sells an item to another nonregulated affiliate (B) and that B, in turn, sells the item to an affiliated carrier without adding value to it. Also assume that A had established a prevailing company price for the item and that B is ineligible for prevailing company pricing. In these circumstances, the carrier would record its transaction with B at A's prevailing company price less any reserves B had properly associated with the item. In the absence of such a price, the carrier would record that transaction at the lower of A's cost as calculated in accordance with our proposals plus any costs B incurred in handling the item and the item's estimated fair market value as of the transfer to the carrier.

[51] Connecting carriers are those LECs described in Section 2(b)(2)-(4) of the Communications Act of 1934, as amended, 47 U.S.C. §152(b)(2)-(4).

is based on reliable data, we propose that, except as otherwise ordered by this Commission, all accounting related to affiliate transactions must comply with generally accepted accounting principles (GAAP). Under this approach, unless otherwise ordered by the Commission, fully subject carriers would have to use costs recorded in accordance with GAAP in calculating nonregulated affiliates' costs. Connecting carriers that are subject to the affiliate transactions rules, but not to other portions of the USOA,[52] would have to use costs recorded in accordance with GAAP in calculating both their costs and their nonregulated affiliates' costs.

**d. Accumulated Depreciation and Other Reserves**

**52.** The definition of cost we propose would require carriers to determine the cost of a resource by deducting accumulated depreciation from the resource's original cost.[53] We propose to require that accumulated depreciation amounts reflect any depreciation prescription by this Commission that applies to the transferred resource. When no such prescription applies, we propose to require that these amounts be consistent with GAAP.

**53.** Our proposed definition of cost would also require that the transferred resource's cost reflect any other reserves associated with a resource.[54] We believe that these other reserves should consist of deferred taxes, unamortized investment tax credits, and depletion allowances, as applicable. We invite comment on whether these reserves should be included in carriers' cost calculations and whether there are other reserves that should also be included.

**3. Cost Apportionment**

**54.** Affiliate transactions can involve either the transfer of resources, the use of resources, or both. To the extent a transaction involves a transfer of a resource that our valuation methods require to be recorded at cost, we propose that the carrier record the transaction at the cost to the affiliate group, as defined above. To the extent a transaction involves the use of a resource, we propose that the carrier determine the resource's cost in accordance with the standards and procedures promulgated in the Joint Cost proceeding for apportioning carrier costs between regulated and nonregulated activities.[55] Those standards and

---

[52] See Joint Cost Reconsideration Order, 2 FCC Rcd at 6301, paras. 160-63.

[53] See para. 46, supra.

[54] Id.

[55] 47 C.F.R. 32.27(d).

procedures reflect a form of fully distributed costing that requires carriers to apportion costs in accordance with cost causality.[56]

55. We invite comment on how precise we should require this apportionment process to be. For instance, when a carrier uses a digital switch to provide both regulated and nonregulated activities, our cost apportionment standards require the carrier to apportion the switch's cost between regulated and nonregulated activities in accordance with the peak nonregulated usage forecast for a three-year period.[57] If the switch is used to provide nonregulated services to both affiliates and non-affiliates, our existing rules require a further apportionment of the nonregulated costs between affiliate transactions and third party transactions. There might have to be additional apportionments if some of the affiliate transactions were to be recorded at fully distributed costs and others at prevailing company prices or estimated fair market value. We ask that the commenters address whether each of these steps needs to be performed with equal exactitude.

56. Similarly, when a nonregulated affiliate uses its equipment in transactions with both an affiliated carrier and non-affiliates, the existing rules contemplate an apportionment of the nonregulated affiliate's costs between affiliate transactions and third party transactions. The rules also contemplate that the costs apportioned to affiliate transactions will be further apportioned between those affiliate transactions that are to be recorded at prevailing company prices and those that are to be recorded at cost. Another apportionment might also be necessary to ensure that the total costs of those transactions that are to be recorded at cost are properly apportioned among USOA accounts. We invite comment on whether these additional apportionments should be retained.

### 4. Allowable Costs

#### a. Overview

57. Regulators, including this Commission, have traditionally computed carrier revenue requirements by means of the following formula:

Revenue Requirements = ((Rate Base) x (Rate of Return)) + Expenses.

The Commission has adopted rate base and expense methodologies and

---

[56] 47 C.F.R. 64.901; see also Joint Cost Order, 2 FCC Rcd at 1318-20, paras. 161-72.

[57] See Joint Cost Reconsideration Order, 2 FCC Rcd at 6287-90, paras. 36-46 & 53-57.

prescribed a rate of return for carriers to use in computing interstate revenue requirements. We propose to require carriers to calculate the costs of those affiliate transactions that must be recorded at cost in accordance with similar rate base and expense methodologies, and using an equivalent rate of return, as described below.

**b. Rate Base**

**58.** To help ensure compliance with our rate base requirements, the Commission staff has developed a generic rate base methodology for AT&T and LECs with annual revenues of at least $100 million to use in determining the fully distributed costs of services nonregulated affiliates provide carriers. Under this methodology, a nonregulated affiliate's rate base equals:

* Property, plant, and equipment; plus
* Deferred charges and other assets; plus
* Cash working capital; less
* Accumulated depreciation, accumulated deferred income taxes, and other deferred credits.

The generic methodology requires AT&T and LECs meeting the $100 million criterion to calculate these components using the 13-month average of the net investments that the nonregulated affiliate reports on monthly financial statements. In calculating that average, the carrier must assume that all of the affiliate's property, plant, and equipment is used and useful.[58]

**59.** Although we believe that we should adopt a rate base methodology for carriers to use in determining the costs of transactions nonregulated affiliates provide carriers, we are concerned that the methodology described above may overstate affiliate transactions costs. We propose to modify that methodology to ensure that it does not lead to the inclusion of improper items in interstate costs. We invite comment on this proposal, which is set forth below.

**60.** Our concerns regarding the existing rate base methodology for affiliate transactions arise from its treatment of several classes of items that our rules require carriers to exclude from the interstate rate base. First, the assumption that all of the affiliate's property, plant, and equipment is used and useful is

---

[58] E.g., Letter from Jose-Luis Rodriguez, Chief, Audits Branch, Accounting and Audits Division, Common Carrier Bureau, to Fred Konrad, Director - Federal Regulatory Matters, Ameritech Corporation, at 3-4 (Apr. 20, 1992).

inconsistent with our restriction of the interstate rate base to investment in used and useful plant.[59] Since this inconsistency could lead to the inclusion of nonproductive investment in interstate costs, we propose to exclude investment in property, plant, and equipment that is not used and useful from the affiliate transactions rate base.

**61.** Second, the generic methodology permits rate base treatment of all investment in construction projects. We are concerned that this treatment is inconsistent with both our current and our proposed policies regarding such projects. Under our current policy, carriers may include investment in construction projects in the interstate rate base only if the projects are designed to be completed in less than one year. Investment in other construction projects must be excluded from the interstate rate base. However, to compensate for this exclusion, we permit carriers to include an allowance for funds used during construction (AFUDC) in the computation of the original cost of the completed construction.[60]

**62.** We recently proposed to change these policies with regard to carrier construction projects. Under our proposals, carriers would include all investment in plant under construction in the interstate rate base, but capitalize AFUDC at the cost of debt and deduct capitalized AFUDC from the interstate revenue requirements for the period in which it is capitalized.[61] In view of the pendency of this AFUDC proceeding, we propose to permit carriers to include investment in plant under construction in affiliate transactions costs to the extent permitted and subject to whatever conditions we adopt for the interstate rate base.

**63.** Third, carriers may be assuming that the generic methodology permits inclusion of noncurrent assets, such as unamortized debt issuance expense, that we exclude from the interstate rate base.[62] Carriers may also believe that the generic methodology permits the automatic inclusion of other noncurrent assets, such as preliminary survey costs for contemplated construction projects and deferred maintenance and retirement charges, that carriers may include in the interstate rate base only

---

[59] 47 C.F.R. §65.800.

[60] See 47 C.F.R. §§32.2000(c)(2)(x), 32.2003, 65.820; Accounting and Ratemaking Treatment for the Allowance for Funds Used During Construction (AFUDC), Notice of Proposed Rulemaking, 8 FCC Rcd 2084 (1993). For interstate ratemaking purposes, AFUDC must generally be computed at the prime rate. See id. at 2084-85, paras. 2-7.

[61] Id. at 2086-87, para. 17 (1993).

[62] 47 C.F.R. §65.820(c); see also 47 C.F.R. §§32.1401 to 32.1500.

pursuant to our specific approval.[63] To eliminate these problems, we propose to make clear that carriers may include noncurrent assets in affiliate transactions costs only to the extent we permit such assets to be included in the interstate rate base.

64. Fourth, carriers using the generic methodology also may not be deducting customer deposits and unfunded accrued pension costs from the affiliate transactions rate base, even though our rules require such items to be deducted from the interstate rate base.[64] We propose that these items also be deducted from the rate base used to calculate affiliate transactions costs.

65. We propose to require all carriers subject to the affiliate transactions rules to comply with the methodology proposed above, in determining the costs of those affiliate transactions that our proposed valuation methods would require them to record at cost.[65] We invite comment on this proposal and on whether we should modify the existing methodology in other respects. We also invite comment on whether we should modify the proposed methodology to reduce burdens on small and mid-sized carriers.

**c. Return Component**

66. In the Joint Cost proceeding, the Commission determined that fully distributed costs should include a return on investment, but no "profit" in excess of the allowed return.[66] In accordance with this determination, the Bureau has required non-average schedule LECs and dominant IXCs to use the prescribed, interstate rates of return in determining this return component, absent specific authorization to the contrary.[67] The most recently prescribed, interstate rate of return for LECs is 11.25 percent.[68]

---

[63] 47 C.F.R. §65.820(c); see also 47 C.F.R. §§32.1402, 32.1410, 32.1438, 32.1439.

[64] 47 C.F.R. §65.830(a).

[65] We note that para. 101, infra, invites comment on whether AT&T should be subject to each aspect of our proposals for large LECs.

[66] Joint Cost Reconsideration Order, 2 FCC Rcd at 6296, para. 119, 6298, para. 133, & 6315, n.203.

[67] See Contel Corporation Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 2150, 2151, para. 7 (Com. Car. Bur. 1989) (Contel Compliance Order).

[68] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Order, 5 FCC Rcd 7507 (1990), recon. denied, 6 FCC Rcd 7193 (1991), aff'd sub nom. Illinois Bell Telephone Co. v. FCC, No. 91-1020

We have also prescribed a 12.2 percent rate of return for AT&T, but that rate of return is no longer used in interstate ratemaking.[69]

67. We believe that we should continue to limit the return on investment carriers include in affiliate transactions costs. We also believe that the advantages of having a single rate of return for all non-average schedule LECs to use in calculating those costs outweigh any possible disadvantages of that approach. Since those LECs' rates are based on the 11.25 percent rate of return prescribed for LEC interstate access service,[70] we propose to require all non-average schedule LECs to use that rate of return in calculating affiliate transactions costs. We also propose to require AT&T and Alascom to calculate their affiliate transactions costs using the 12.2 percent rate of return most recently prescribed for AT&T.[71]

68. In making these proposals, we recognize that our regulation of LECs has changed dramatically since the adoption of the affiliate transactions rules. These changes have resulted in a continuum of regulatory approaches ranging from traditional, rate of return regulation to price caps.[72] We invite the commenters to address whether we should vary the rate of return used in calculating affiliate transactions costs, depending on how we regulate the individual LEC.

69. For instance, our LEC price cap program defines two permissible earnings ranges for price cap LECs: one extending from 10.25 percent to 14.25 percent for LECs electing the 3.3 percent productivity offset, the other extending from 10.25 percent to

---

(D.C. Cir. Apr. 2, 1993).

[69] See Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Report and Order, CC Docket No. 84-800, Phase III, 51 Fed. Reg. 32920, slip op. at 48, para. 88 (Sept. 17, 1986), recon. 2 FCC Rcd 5636 (1987). We have not prescribed a rate of return for Alascom.

[70] Although price cap LECs are no longer regulated on a rate of return basis, their initial price cap indexes were based on the prescribed 11.25 percent rate of return.

[71] AT&T's initial price cap indexes were based on this prescribed rate of return. We note that para. 101, infra, invites comment on whether we should subject AT&T to each aspect of our proposed system, including our proposal to limit the rate of return carriers can earn on those affiliate transactions required to be recorded at cost.

[72] Regulatory Reform Order, 8 FCC Rcd at 4545-46, paras. 4-6; LEC Price Cap Order, 5 FCC Rcd at 67867, paras. 1-5; AT&T Price Cap Order, 4 FCC Rcd at 2893, paras. 38-39.

15.25 percent for LECs electing the 4.3 percent productivity offset.[73] By defining these earnings ranges in terms of specific percentages, rather than through reference to a prescribed rate of return, this system detaches price cap LECs from rate of return regulation. In these circumstances, we invite comment on whether we should require price cap LECs to compute their affiliate transactions costs using rates of return from within these ranges other than the rate of return prescribed for LEC interstate access service and, if so, what rates of return we should require. We request that the commenters address, in particular, whether we should pick percentages that reflect the rate of return on interstate access service each price cap LEC actually achieves after sharing.

**70.** Similarly, Section 61.50 of our rules[74] permits non-price cap LECs that elect optional incentive regulation to retain earnings up to 150 basis points (1.5 percent) above the rate of return prescribed for LEC interstate access service. LECs electing this form of regulation must file tariffs for two-year periods. During that period, LECs may increase the tariffed rates only to the extent necessary to produce earnings 75 basis points (0.75 percent) below the rate of return prescribed for LEC interstate access service. We invite the commenters to address whether we should require optional incentive regulation LECs to compute their affiliate transactions costs using rates of return from within this minus 75 basis points/plus 150 basis point range other than the rate of return prescribed for LEC interstate access service and, if so, what rates of return we should pick. We request that the commenters address, in this regard, whether for each LEC operating under optional incentive regulation we should pick a percentage that reflects that LEC's actual interstate earnings as well as the methodology we should use to measure those earnings.

**71.** Finally, the rate of return we prescribe for LEC interstate access service may differ from the rates of return states prescribe or authorize for intrastate telecommunications services. Since affiliate transactions support intrastate as well as interstate services, we invite comment on whether we should

---

[73] LEC Price Cap Order, 5 FCC Rcd 6801-02, paras. 123-27. More specifically, price cap LECs may increase their interstate rates to the extent necessary to earn a 10.25 percent interstate rate of return. LECs electing the 3.3 percent productivity offset may retain all interstate earnings up to 12.25 percent, 50 percent of interstate earnings between 12.25 percent and 16.25 percent, and no interstate earnings above 16.25 percent. LECs electing the 4.3 percent productivity offset may retain all interstate earnings up to 13.25 percent, 50 percent of interstate earnings between 13.25 percent and 17.25 percent, and no interstate earnings above 17.25 percent. Id.

[74] Regulatory Reform Order, 8 FCC Rcd at 4565-66, to be codified at 47 C.F.R. §61.50.

require or permit any LEC to determine the return component of affiliate transactions costs using a composite of the prescribed, interstate rate of return and the intrastate rates of return prescribed or authorized for that LEC. We also invite comment on how this composite should be calculated and on whether the benefits of this approach would exceed the additional burden of such calculations. We ask the commenters to discuss whether this approach would improperly delegate to state regulators our authority over federal accounting matters.

**d. Expenses**

**72.** We propose to make clear that carriers must include operating expenses, depreciation and amortization expense, taxes, and reasonable charitable contributions in their cost calculations for those affiliate transactions that our proposed valuation methods would require carriers to record at cost. We also propose to require that those calculations reflect any interest related to customer deposits apportioned to affiliate transactions, and exclude gains and losses similar to those that our rules exclude from the calculation of carrier net income.

**73.** The gains and losses we propose to exclude fall into three categories. First, our rules require carriers to treat gains related to property sold to others and leased back under capital leases for use in telecommunications services as a deferred credit to be amortized over the amortization periods established in the leases.[75] We propose to require carriers to treat property involved in sale/lease back transactions in an identical manner in calculating affiliate transactions costs.

**74.** Second, our rules allow gains and losses related to the disposition of nondepreciable land and artworks to be included in carrier net income, but only to the extent they were used in regulated operations and included in the interstate rate base.[76] We propose to require the inclusion of such gains and losses in affiliate transactions costs to the extent and only to the extent the related land or artworks supported affiliate transactions. We propose, in addition, that carriers calculate the extent of that support by applying the ratio of each affiliate's revenue from affiliate transactions for the period during which the affiliate owned the land or artworks to the affiliate's total revenue for that period.

**75.** Third, absent a specific Commission determination that particular items should be included, our rules require carriers to exclude nonoperating income and expenses, such as dividends on

---

[75] 47 C.F.R. §65.450(b)(1).

[76] 47 C.F.R. §65.450(b)(2).

stock investments and income from sinking funds, and extraordinary items, such as extraordinary income credits and charges, from their net income calculations.[77] We propose an identical approach with regard to the calculation of affiliate transactions costs.

76. We invite comment on each of these proposals and on whether we should exclude other items from affiliate transactions costs. We also invite comment on whether we should impose this expense methodology on all carriers subject to the affiliate transactions rules, rather than on only AT&T and those LECs whose annual revenues total at least $100 million.[78]

**5. Estimating, Monitoring, and True-up Procedures**

77. The methodologies we propose for determining affiliate transactions costs require accurate information regarding the ongoing operations of carriers and their nonregulated affiliates. Since that information is not always available as transactions occur, we believe that carriers should maintain procedures for estimating affiliate transactions costs, monitoring the estimates' accuracy, and truing-up if they prove inaccurate. We propose to require carriers to use the methods described below in performing these functions. We invite comment on these methods.

78. First, we propose to require carriers to maintain procedures for estimating the costs of affiliate transactions. In many instances, the best source of information on those costs will be company budgets that reveal, among other matters, the costs each carrier and nonregulated affiliate anticipates it will incur, the kinds of transactions in which it intends to engage, and the expected volume of those transactions. This and similar information should allow carriers to estimate affiliate transactions costs. We propose to require carriers to use these estimates to record affiliate transactions in USOA accounts as they occur.

79. Second, as volume deviates from expectations and other operational changes occur, a carrier's good faith estimates could become inaccurate. We propose to require carriers to monitor the accuracy of their estimates by periodically comparing them with actual results. If a deviation occurs, we believe that carriers should have to update their estimates for use in recording future

---

[77] 47 C.F.R. §65.450(d). The exclusion for nonoperating income and expenses does not apply to reasonable charitable contributions or interest related to customer deposits.

[78] We note that para. 101, infra, invites comment on whether we should subject AT&T to each aspect of our proposed system, including our proposal to specify an allowable expense methodology for use in calculating affiliate transaction costs.

affiliate transactions. We propose that this updating occur quarterly.

80. Third, if actual costs deviate from estimates, we believe that carriers should be required to true-up their books to eliminate any discrepancies. We propose to require that the truing-up process be completed prior to closing the carrier's books for the year in which the transactions took place, but we invite comment on whether a different truing-up schedule should be required to accommodate transactions occurring close to the end of the year. We also propose to use the one-year period covered by the carrier's books to measure compliance with our affiliate transactions rules.

81. We propose, in addition, to require carriers to retain documentation showing how these estimating, monitoring, and truing-up procedures are performed.

**B. Prevailing Company Prices**

**1. 75 Percent Test**

82. This Notice proposes to restrict prevailing company pricing to affiliate transactions in which the nonregulated affiliate sells at least 75 percent of its output to non-affiliates.[79] We invite comment on two alternatives for measuring that output that we describe below.

83. The first alternative would require carriers to measure each nonregulated affiliates's output using its actual revenues during the year for which affiliate transactions are to be valued. If we adopt this alternative, we intend to help assure ongoing compliance by requiring carriers to project annually whether each of their nonregulated affiliates will meet or exceed the 75 percent mark during the upcoming year. We also propose that the initial revenue projections assume that all affiliate transactions will be provided at cost. Thereafter, carriers would follow one of two approaches, depending on the results of the initial projections. If the nonregulated affiliate being considered were projected to fall short of the 75 percent mark during the upcoming year, the carrier would value the nonregulated affiliate's sales to affiliates at the lower of fully distributed costs and estimated fair market value as proposed in this Notice. If the nonregulated affiliate were projected to meet or exceed the 75 percent mark during the upcoming year, the carrier would value at least some of the nonregulated affiliate's sales to affiliates at prevailing

---

[79] See paras. 15-22, supra.

company prices.[80]

84. The approach described above would continue until updated projections or actual data change the results of the 75 percent test for the nonregulated affiliate in question. In addition, the final accounting entries for the year would be based on actual, rather than projected, data.

85. The second alternative would require carriers to measure output using the nonregulated affiliate's revenues from the immediately preceding year. If we adopt this alternative, we propose to require carriers to apply the existing valuation methods to determine whether each of their nonregulated affiliates had sold at least 75 percent of their output to non-affiliates during the calendar year immediately preceding the year any new valuation methods become effective. The results of these determinations would be applied throughout the year in which the new valuation methods take effect. Thereafter, carriers would use the new valuation methods to reevaluate annually whether its nonregulated affiliates meet or exceed the 75 percent mark. Under this approach, the final accounting entries for any given year would be based on historical data for the preceding year.

**2. Other Potential Conditions**

86. Under our current rules, a carrier must provide substantial quantities of an asset or service to non-affiliates in order to be eligible for prevailing company pricing.[81] We believe that this product-by-product approach might be unduly restrictive if we adopt the proposed 75 percent test. Therefore, we invite comment on whether we should provide for prevailing company pricing on another basis, such as a product line, line of business, or total company basis.

87. Under a product line approach, each affiliate that engages in affiliate transactions with a nonregulated affiliate that meets the 75 percent test would be divided into product lines. An affiliate transaction would be eligible for prevailing company pricing only if the providing affiliate also provided one or more products within the same product line to non-affiliates. Under a line of business approach, each affiliate that engages in affiliate

---

[80] In paragraphs 86-89, infra, we invite comment on whether carriers should record at prevailing company prices all, rather than only a portion, of their transactions with nonregulated affiliates that meet or exceed the 75 percent mark.

[81] See Joint Cost Reconsideration Order, 2 FCC Rcd at 6296, para. 120; see also U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 2 FCC Rcd 195, 199, paras. 33-34 (Com. Car. Bur. 1988) (U S West Order).

transactions would be divided into lines of business. An affiliate transaction would be eligible for prevailing company pricing only if it occurred within the same line of business as transactions with non-affiliates. Finally, the total company approach would permit prevailing company pricing whenever an affiliate transaction involved a nonregulated affiliate meeting the 75 percent test.

88. We invite comment on the relative merits of these approaches in comparison to the product-by-product approach implicit in the current rules. In this regard, we ask commenters to address how we might apply the various approaches to individual products or features that the providing affiliate does not sell to non-affiliates. We are particularly interested in comments regarding the methods carriers might use to determine the amounts to record for these products or features.

89. We also invite comment on whether we should further condition eligibility for prevailing company pricing when the 75 percent test is met for the nonregulated affiliate as a whole. While we believe that the 75 percent test would protect against most potential abuses, we invite commenters to discuss whether we should preclude prevailing company pricing for each individual product and feature for which the providing affiliate's sales to non-affiliates do not constitute at least a given portion, such as 25 percent, of its total sales of that product or feature. Finally, although we propose to eliminate the substantiality requirement, we invite comment on how we might define substantial under each of the approaches for determining eligibility for prevailing company pricing discussed above[82] in the event we retain that requirement.

**C. Fair Market Value**

90. The valuation methods we propose in this Notice would require carriers to estimate the fair market value of all non-tariffed affiliate transactions for which we do not permit prevailing company pricing. We believe that the procedures carriers use in estimating that value should vary with the circumstances of the transaction. Therefore, we do not intend to specify the precise steps carriers should include in each particular estimation process. Instead of specifying those steps, we propose to require carriers to attempt in good faith to determine whether fair market value exceeds cost when they provide assets or services to nonregulated affiliates and whether cost exceeds fair market value when they receive assets or services from nonregulated affiliates. If these attempts indicate that assets or services should be recorded at fair market value, we propose to require carriers to make additional efforts to define that value. We invite comment on this overall approach.

---

[82] See para. 87, supra.

**91.** Despite this proposed overall approach, we believe there may be classes of affiliate transactions that lend themselves to a set of prescribed procedures for estimating fair market value. We invite—the commenters to discuss whether this is so. For instance, if companies making certain kinds of purchases routinely solicit competitive bids, survey potential suppliers, or obtain independent appraisals, we may require carriers to adopt identical procedures.

**92.** We also invite comment on the role the prices the providing affiliate charges non-affiliates should play in the determination of fair market value. Although those prices do not necessarily establish fair market value,[83] we believe that the fair market value of assets and services carriers provide nonregulated affiliates is unlikely to fall below the prices carriers charge non-affiliates. We also believe that the fair market value of assets and services nonregulated affiliates provide carriers is unlikely to exceed the prices nonregulated affiliates charge non-affiliates.

**D. Miscellaneous Requirements**

**1. Cost Allocation Manuals**

**93.** As indicated previously, we require AT&T and LECs with annual revenues of at least $100 million to file cost manuals detailing their cost apportionment procedures.[84] Each of these manuals must include a chart showing all of the filing carrier's corporate affiliates.[85] Each manual must also identify the affiliates that engages or will engage in transactions with the carrier, and describe the nature, terms, and frequency of those transactions.[86] We propose below additional cost manual requirements that we believe may present cost-effective tools for ensuring compliance with the affiliate transactions rules, including any changes to those rules we adopt in this proceeding. We invite comment on these proposals and on whether any further changes to our cost manual requirements would help achieve our objectives in this proceeding.

**94.** The first new cost manual requirement that we propose concerns nonregulated operations within carriers that do not use

---

[83] See para. 18, supra.

[84] See para. 7, supra.

[85] 47 C.F.R. §64.903(a)(3).

[86] 47 C.F.R. §64.903(a)(4).

resources jointly or in common with regulated operations.[87] In the Joint Cost Order, the Commission determined that these nonregulated operations should be subject to the affiliate transactions rules. The Commission, however, did not make clear whether cost manuals must include information regarding these nonregulated operations. We propose to clarify this area by requiring that cost manuals identify any such nonregulated operations. We also propose to require that the manuals provide information on these operations' affiliate transactions comparable to that which we require for other affiliate transactions.

95. Second, this Notice proposes to restrict prevailing company pricing to affiliate transactions involving nonregulated affiliates that sell at least 75 percent of their output to non-affiliates.[88] We propose to require carriers to state in their cost manuals which of their affiliates meet this test. These statements would have to be updated quarterly.

96. Third, although this Notice proposes to require carriers to use the prescribed interstate rates of return in determining the return component of affiliate transactions costs, we invite comment on alternatives to that proposal.[89] If we adopt any of those alternatives, we propose to require that each cost manual state the rate of return the subject carrier will use to calculate affiliate transactions costs.

97. Finally, our proposed valuation methods would require carriers to estimate the fair market value of all non-tariffed affiliate transactions for which we do not permit prevailing company pricing. In lieu of specifying procedures for carriers to use in estimating fair market value,[90] we propose to require that cost manuals describe the carriers' proposed procedures.

**2. Independent Audits**

98. Section 64.904(a) of our rules[91] requires each LEC that is required to file a cost allocation manual to obtain an independent audit annually. This audit must provide a positive opinion on whether the data shown in the carrier's annual joint

---

[87] A structurally separate subdivision within a carrier might be such a nonregulated operation. See also paras. 104-106, infra.

[88] See para. 22, supra.

[89] See paras. 66-71, supra.

[90] See paras. 90-92, supra.

[91] 47 C.F.R. §64.904(a).

cost report[92] present fairly, in all material respects, the information required to appear in the report in accordance with the Joint Cost Orders and the Commission's rules in force as of the date of the auditor's report. We propose to amend this rule to make clear that the scope of the independent audit must encompass compliance with any requirements we adopt in this proceeding. We invite comment on this proposal.

### 3. Audit Trail

**99.** In the Joint Cost Order, the Commission stated that carriers would be expected to maintain a complete audit trail of all cost allocations and affiliate transactions.[93] The Commission, however, did not adopt any rule requiring that such an audit trail be maintained. We propose to incorporate an audit trail requirement into our rules. We invite comment on this proposal.

## V. OTHER MATTERS

### A. Applicability to IXCs

**100.** In the Joint Cost Order, the Commission determined that dominant IXCs, a group that consists of AT&T and Alascom, should be subject to the affiliate transactions rules. AT&T is required to file a cost allocation manual and to obtain an annual attestation audit.[94] Alascom is exempt from these requirements.[95]

**101.** Since the adoption of the affiliate transactions rules, we have adopted a price cap system for AT&T that imposes no sharing obligations.[96] This system greatly reduces the incentives that AT&T may have to shift costs between its nonregulated operations and its carrier operations. Since AT&T's price caps are unrelated to AT&T's current costs, attempts by AT&T to manipulate the costs it records for affiliate transactions will not increase AT&T's rates. Indeed, AT&T has often elected to set prices at levels below the price cap maximums. This below-cap pricing suggests competitive pressures on the rates AT&T can charge and limits on its ability to increase prices as a result of cost shifting. In view of these reduced incentives to shift costs, we invite comment

---

[92] This report provides data on regulated and nonregulated usage of the USOA accounts used in calculating interstate costs. See 47 C.F.R. §43.21(f)(2).

[93] Joint Cost Order, 2 FCC Rcd at 1329, para. 242.

[94] 47 C.F.R. §64.903(a); Joint Cost Order, 2 FCC Rcd at 1328, para. 236.

[95] See Alascom Letter, supra n.12.

[96] AT&T Price Cap Order, 4 FCC Rcd at 2893-98, paras. 36-52.

on whether AT&T should be subject to each aspect of the system we propose for affiliate transactions.[97]

**102.** On May 17, 1993, the Alaska Joint Board tentatively recommended and invited comment on a new market structure for the provision of interstate telecommunications service between Alaska and the contiguous states and between Alaska and Hawaii.[98] In recommending a new structure, the Joint Board observed that the present structure is defined by a Joint Service Arrangement ("JSA") that requires AT&T to reimburse Alascom for the expenses it incurs in providing interstate message telephone service with AT&T to the extent Alascom does not recover them from its customers.[99] The Joint Board recognized that the JSA may give Alascom substantial incentives to impose nonregulated costs on interstate ratepayers and engage in imprudent transactions.[100] Although the Joint Board recommended that the JSA be terminated, we wish to ensure that any new market structure adopted for Alaska eliminates these incentives. Therefore, we propose to require Alascom to apply the valuation methods we propose in this proceeding. To ensure Alascom's compliance with those methods and with our cost apportionment requirements, we also propose to require Alascom to submit a cost allocation manual for Commission approval and to obtain an attestation audit. We invite comment on these proposals.

**B. Applicability to Price Cap LECs**

**103.** In contrast to the AT&T price cap system, the price cap system we adopted for LECs imposes extensive sharing obligations.[101] When we adopted this system, we scheduled a review of the LECs' performance under price caps for 1994.[102] In

---

[97] We note that we recently determined that the AT&T price cap plan has worked well, combining reasonable rates and modest regulatory requirements with strong incentives for productivity growth and innovation. Price Cap Performance Review for AT&T, Report, 8 FCC Rcd 5165 (1993). We, therefore, proposed only minor modifications to that plan. Price Cap Performance Review for AT&T, Notice of Proposed Rulemaking, 8 FCC Rcd 5205 (1993).

[98] Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Tentative Recommendation and Order Inviting Comments, CC Docket No. 83-1376, 8 FCC Rcd 3684 (Joint Bd. 1993) (Alaska Tentative Recommendation).

[99] See id. at 3684, para. 2.

[100] Id. at 3687, para. 26.

[101] LEC Price Cap Order, 5 FCC Rcd at 6835, paras. 397-98.

[102] Id. at 6834, para. 385.

promising this review, we stated that we would reevaluate the sharing mechanism as well as other aspects of the LEC price cap system. Although we believe that affiliate transactions rules are necessary to assist us in determining the LECs' sharing obligations,[103] we do not intend in this proceeding to prejudge the price cap LEC performance review. If we should decide in the LEC price cap review proceeding to alter the sharing mechanism, we can at that time reevaluate the appropriate extent to which the affiliate transactions rules should apply to the price cap LECs.

### C. Applicability to Particular Kinds of Transactions

#### 1. Parts of Carriers

**104.** Most nonregulated activities in which carriers engage involve the use of resources that the carriers also use to provide regulated products or services. In the Joint Cost proceeding, the Commission determined that all costs of these resources, including those incurred for nonregulated activities, should be recorded in the USOA accounts prescribed for telephone company operations. These accounts are referred to as regulated accounts.[104]

**105.** Carriers can also engage in nonregulated activities that do not use resources jointly or in common with regulated products or services. In the Joint Cost proceeding, the Commission created Account 7990, Nonregulated net income, for carriers to use to record these activities.[105] This account is a nonregulated account.

**106.** In the Joint Cost proceeding, the Commission determined that transactions between operations that record their costs in regulated accounts and operations that record their costs in nonregulated accounts should be subject to the affiliate transactions rules.[106] The Commission also determined that transactions between operations that record their costs in regulated accounts should not be subject to those rules.[107] We propose to continue these practices.

#### 2. Transactions between Nonregulated Operations

---

[103] See note 14, supra.

[104] 47 C.F.R. §32.14(c).

[105] 47 C.F.R. §32.7990.

[106] See Joint Cost Reconsideration Order, 2 FCC Rcd at 6296, para. 121; Joint Cost Order, 2 FCC Rcd at 1336, para. 298.

[107] See Joint Cost Reconsideration Order, 2 FCC Rcd at 6296, para. 122.

**107.** When it adopted the affiliate transactions rules, the Commission intended to subject to those rules all transactions between operations that record their costs in regulated accounts and nonregulated affiliates.[108] Despite this intent, carriers have asserted that transactions between nonregulated affiliates and nonregulated operations within carriers that record their costs in regulated accounts are not subject to those rules. The carriers argue that such transactions do not affect interstate costs.

**108.** We believe, however, that such transactions affect interstate costs in two ways. First, as explained in the Bell Atlantic Review Order, the costs recorded in USOA accounts for transactions between these carrier operations and nonregulated affiliates affect the overall apportionment of costs between regulated and nonregulated activities.[109] Second, even when they are recorded in USOA revenue accounts but not the USOA cost accounts,[110] such transactions can be links in transactional chains that result in costs being recorded in USOA accounts.[111] Therefore, we propose to amend the affiliate transactions rules to make clear that they apply to transactions between nonregulated affiliates and nonregulated operations within carriers that record their costs in regulated accounts. We invite comment on this proposal.

### 3. Quantification

**109.** The proposed valuation methods would change the amounts carriers record in USOA accounts for affiliate transactions. We invite the commenters to quantify the impact each of those methods would have on regulated operations. We also invite carriers to quantify which of their nonregulated affiliates meet the 75 percent test we propose for determining eligibility for prevailing company pricing. To facilitate the development of a complete record in this proceeding, we hereby delegate to the Bureau our power to require carriers to quantify the potential effect of our proposals in this Notice.

## VI. PROCEDURAL MATTERS

---

[108] See Joint Cost Order, 2 FCC Rcd at 1336, para. 298; see also Bell Atlantic Review Order, 2 FCC Rcd at 2552, para. 9.

[109] Bell Atlantic Review Order, 2 FCC Rcd at 2552, para. 11.

[110] This happens when a nonregulated operation that records its activities in regulated accounts provides an affiliate transaction that does not involve the transfer of a resource that had been recorded in an investment account.

[111] See paras. 48-50, supra.

**A. Ex Parte**

**110.** This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[112]

**B. Regulatory Flexibility**

**111.** We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposals in this proceeding are adopted, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[113] Those proposals concern the methods dominant IXCs and LECs use to account for affiliate transactions. These carriers are generally large corporations or affiliates of large corporations, are dominant in their fields of operation, and therefore are not "small entities" as defined by that act.[114] The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 605(b) of that act.[115]

**C. Comment Dates**

**112.** We invite comment on the proposals and tentative conclusions set forth above. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[116] interested parties may file comments on or before December 10, 1993, and reply comments on or before January 10, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. A courtesy copy should also be sent to William A. Kehoe III, Accounting and Audits Division, 2000 L Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC

---

[112] See generally 47 C.F.R. §§1.1202, 1.1203, 1.1206(a).

[113] 5 U.S.C. §601(3).

[114] See MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).

[115] 5 U.S.C. §605(b).

[116] 47 C.F.R. §§1.415, 1.419.

Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

## VII. ORDERING CLAUSES

**113.** Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 218-220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 201-205, 218-220, and 403, NOTICE IS HEREBY GIVEN of proposed amendments to Parts 32 and 64 of the Commission's rules, 47 C.F.R. Parts 32 and 64, described in this Notice of Proposed Rulemaking.[117]

**114.** IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau, SHALL HAVE DELEGATED AUTHORITY to require carriers to quantify the potential effect of our proposals in this Notice.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

[117] The appendix to this Notice sets forth the text of proposed rules. That text also corrects several typographical errors in the existing rules.

## APPENDIX--PROPOSED RULES

Parts 32 and 64 of the Commission's Rules and Regulations, 47 C.F.R. Parts 32 & 64 are proposed to be amended as follows:

1. The authority citation for Part 32 is amended to read as follows:

**Authority: Secs. 4 and 220, 48 Stat. 1066, as amended; 47 U.S.C. 154 and 220, unless otherwise noted. Interpret or apply secs. 1, 201-205, 218-220, and 403, as amended, 47 U.S.C. 151, 201-205, 218-220, and 403, unless otherwise noted.**

2. Section 32.23 is amended by revising paragraph (b) to read as follows:

**§ 32.23 Nonregulated Activities.**

* * * * *

(b) When a nonregulated activity does not involve the joint or common use of assets or resources in the provision of both regulated and nonregulated products and services, carriers shall account for these activities on a separate set of books consistent with instructions set forth in §§ 32.1406 and 32.7990. Transactions between an activity for which a separate set of books is maintained and an activity for which a separate set of books is not maintained shall be accounted for in accordance with § 32.27. In the separate set of books, carriers may establish whatever detail they deem appropriate beyond what is necessary to provide this Commission with the information required in §§ 32.1406 and 32.7990.

* * * * *

3. Section 32.27 is amended by revising paragraphs (a) through (d) to read as follows:

**§ 32.27 Transactions with Affiliates.**

(a) Unless otherwise approved by the Chief, Common Carrier Bureau, transactions with nonregulated affiliates involving transfers into or out of the regulated accounts shall be recorded by the carrier as provided in paragraphs (b) through (f) of this section.

(b) Affiliate transactions provided pursuant to tariffs that are generally available, on file with a federal or state agency, and in effect shall be recorded at tariffed rates.

(c) Affiliate transactions that are not required to be recorded at tariffed rates shall be recorded at prevailing company prices

if and only if:

(1) The transactions are with nonregulated affiliates that sell at least 75 percent of their output to non-affiliates, and

(2) Any other conditions specified by Commission order are met.

(d) All other affiliate transactions shall be recorded at either cost or estimated fair market value in accordance with the following conditions:

(1) Sales to nonregulated affiliates shall be recorded at the higher of cost and estimated fair market value.

(2) Purchases from nonregulated affiliates shall be recorded at the lower of cost and estimated fair market value.

(3) In calculating the costs of affiliate transactions, carriers shall comply with the procedures specified by Commission order.

(4) In estimating the fair market value of affiliate transactions, carriers required to file cost allocation manuals shall comply with the procedures set forth in those manuals.

* * * * *

4. The authority citation for Part 64 is amended to read as follows:

**Authority: Secs. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 1, 201-205, 218-220, 225-227, and 403, 48 Stat. 1070, as amended, 47 U.S.C. 151, 201-205, 218-220, 225-227, and 403, unless otherwise noted.**

5. Section 64.903 is amended by revising paragraphs (a)(3) and (a)(4), adding paragraph (a)(5), renumbering former paragraphs (a)(5) and (a)(6), and revising paragraphs (b) and (c) to read as follows:

**§ 64.903 Cost allocation manuals.**

(a) * * *

* * * * *

(3) A chart showing all of the carrier's corporate affiliates including any operations within the carrier that engage in nonregulated activity that does not involve the joint or common use of assets or resources in the provision of both regulated and nonregulated products and services;

(4) A statement **listing** each affiliate that engages in or will engage in transactions with the carrier, identifying which, if any, of the listed affiliates sells at least 75 percent of its output to non-affiliates, and describing the nature, terms and frequency of each transaction.

(5) A description of the carrier's procedures for estimating the fair market value of affiliate transactions.

(6) A cost apportionment table showing, for each account containing costs incurred in providing regulated services, the cost pools within that account, the procedures used to place costs into each cost pool, and the method used to apportion the costs within each cost pool between regulated and nonregulated activities; and

(7) A description of the time reporting procedures that the carrier uses, including the methods or studies designed to measure and allocate nonproductive time.

(b) Each carrier shall ensure that the information contained in its cost allocation manual is accurate. Carriers must update their manuals at least quarterly, except that changes to the cost apportionment table and to the description of time reporting procedures must be filed at least 60 days before the carrier plans to implement the changes. Proposed changes in the description of time reporting procedures, the statement concerning affiliate transactions, and the cost apportionment table must be accompanied by a statement quantifying the impact of each change on regulated operations. Changes in the description of time reporting procedures and the statement concerning affiliate transactions must be quantified in $100,000 increments at the account level. Changes in cost apportionment tables must be quantified in $100,000 increments at the cost pool level. The Chief, Common Carrier Bureau, may suspend any such changes for a period not to exceed 180 days, and may thereafter allow the change to become effective or prescribe a different procedure.

(c) The Commission may by order require any other communications common carrier to file and maintain a cost allocation manual as provided in this section.

6. Section 64.904 is amended by revising paragraph (a) to read as follows:

**§ 64.904**

(a) Each local exchange carrier required by this part or by Commission order to file a cost allocation manual shall have performed annually, by an independent auditor, an audit that provides a positive opinion on whether the applicable data shown in the carrier's annual report required by § 43.21(f)(2) of this chapter presents fairly, in all material respects, the information

of the carrier required to be set forth therein in accordance with the carrier's cost allocation manual, the Commission's Joint Cost Orders issued in conjunction with CC Docket No. 86-111 and Affiliate Transactions Orders issued in conjunction with CC Docket No. 93-251, and the Commission's rules and regulations including sections 32.23, 32.27, 64.901 and 64.903 in force as of the date of the auditor's report. The audit shall be conducted in accordance with generally accepted auditing standards, except as otherwise directed by the Chief, Common Carrier Bureau.

* * * * *



*U.S. Government Printing Office: 1993 — 300-842/00005